(12)

No. 90-584-CFX
Status: GRANTED

Title: Southwest Marine, Inc., Petitioner
v.
Byron Gizoni

Docketed:
October 9, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: McMullen Jr.,James J.

Counsel for respondent: Easley,Preston

Entry	Date	Note	Proceedings and Orders
1	Oct 9 1990	G	Petition for writ of certiorari filed.
2	Nov 6 1990		Brief of respondent Byron Gizoni in opposition filed.
3	Nov 7 1990		DISTRIBUTED. November 21, 1990
4	Nov 19 1990	X	Reply brief of petitioner Southwest Marine, Inc. filed.
5	Feb 15 1991		REDISTRIBUTED. February 22, 1991
6	Feb 25 1991		Petition GRANTED. limited to Question 3 presented by the petition.
			**********
7	Apr 11 1991		Brief amicus curiae of Shipbuilders Council of America filed.
8	Apr 11 1991		Brief amici curiae of Global Marine, Inc., et al. filed.
9	Apr 11 1991		Joint appendix filed.
10	Apr 11 1991		Brief of petitioner Southwest Marine, Inc. filed.
14	Apr 30 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
11	May 13 1991		Brief of respondent Byron Gizoni filed.
12	May 15 1991		Brief amicus curiae of United States filed.
13	May 15 1991		Brief amicus curiae of Brotherhood of Carpenters and Joiners of America filed.
15	Jun 3 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
16	Jun 14 1991		Reply brief of petitioner Southwest Marine, Inc. filed.
17	Jul 12 1991		CIRCULATED.
18	Jul 19 1991		SET FOR ARGUMENT TUESDAY, OCTOBER 15, 1991. (3RD CASE)
19	Sep 16 1991		Record filed.
		*	LODGING rec'd by petitioner. LA. Law Review Article; Seaman Status: Supreme Court Recharts its Course (12 copies
20	Sep 27 1991		Record filed.
		*	Certified proceedings, U.S. Dist.Court, Sou. Dist., Calif. and U.S. Court of Appeals, 9th Circuit (Briefs)
21	Oct 15 1991		ARGUED.

Supreme Court, U.S.
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CLERK

No. 90-584

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Ninth Circuit err in deciding that Plaintiff was entitled to a jury trial on his status as a Jones Act seaman where Plaintiff, a ship repairman employed by a shipyard, was covered by the Longshore Act and where the District Court had determined that Plaintiff: 1) did not work aboard a vessel in navigation; 2) was not permanently assigned to any vessel in navigation; and 3) did not aid in the navigation of any vessel;

II. What is the proper test for seaman's status pursuant to the Jones Act and general maritime law;

III. Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen;

IV. Can the issue of seaman's status be decided as a matter of law;

V. Is *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), still good law in light of the circuits' consistent departure from that decision; and

VI. In light of the need to preserve the resources of the Court, should this case be consolidated with a case involving similar issues already before this Court, *Wilander v. McDermott Intern., Inc.*, 887 F.2d 88 (5th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S.Ct. 3212 (1990), in order to obtain a ruling that would clarify the seaman's status issue?

LIST OF PARTIES

The following are the parties to this proceeding:

Byron Gizoni
Plaintiff-Respondent

Southwest Marine, Inc.
Defendant-Petitioner

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No. 90-____

In the Supreme Court

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OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
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BYRON GIZONI,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit, reported at 909 F.2d 385 (9th Cir. 1990), reversed and remanded the decision of the United States District Court for the Southern District of California. The District Court had granted the motion of Southwest Marine for summary judgment on the grounds that Plaintiff is a ship repairman. The District Court had reasoned that Plaintiff's occupation as a ship repairman established coverage under the Longshore Act[1] and precluded coverage under the Jones Act.[2] The District Court further determined that Plaintiff had failed to satisfy as a matter of law any of the three elements necessary for establishing seaman status under the Jones Act, as required by the Ninth Circuit's three prong test.

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[1]Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter "Longshore Act" or "LHWCA".

[2]The Jones Act, 46 U.S.C. § 688.

JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 24, 1990. Consequently, jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. § 688(a):

> (a) Application of Railway Employee Statutes; Jurisdiction.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G):

> (3) The term "employee" means any person engaged in maritime employment, including any

> longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --
>
> (G) a master or member of a crew of any vessel; . . .

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a):

> The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.

STATEMENT OF THE CASE

On April 6, 1987, Byron Gizoni (hereinafter "Gizoni") was working as a rigger for Southwest Marine, Inc. (hereinafter "Southwest Marine"). Gizoni alleges that he stepped into a hole and injured his foot while walking on the surface of a floating platform. The floating platform was secured to a floating drydock at Southwest Marine's shipyard where a naval vessel was undergoing repairs.

Gizoni received workers' compensation benefits from Southwest Marine pursuant to the Longshore Act.[3] Subsequently, Gizoni filed a formal claim for benefits pursuant to the LHWCA. Nonetheless, on September 30, 1987, Gizoni filed suit against his employer, Southwest Marine, pursuant to the Jones Act and alleged, among other things, that he was a seaman and injured as a result of the negligence of his employer.

Southwest Marine filed its *Answer to Complaint* on February 4, 1988, alleging, among other defenses, that Gizoni was not a seaman for purposes of the Jones Act, and further that his Jones Act claim against Southwest Marine is barred by the exclusivity provisions of the LHWCA.[4]

On June 7, 1988, Southwest Marine filed its *Notice of Motion and Motion for Summary Judgment*, asserting the above defenses. In support thereof, Southwest Marine filed a *Memorandum of Points and Authorities In Support of Motion for Summary Judgment, Declaration of Allan Ovrom, Declaration of John Vitzthum, Declaration of David Bechtel, Declaration of John H.*

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[3]Southwest Marine paid for medical treatment on behalf of Gizoni in the amount of $3,239.56 and provided Longshore disability compensation payments to Gizoni in the amount of $12,368.44.

[4]"The liability of an employer prescribed in section 904 of this Title shall be exclusive and in place of all other liability of such employer to the employee . . . ." 33 U.S.C. § 905(a).

West, Declaration of Robert Mitchell, and *Declaration of Paul K. Witherspoon*. The declarations submitted by Gizoni and Southwest Marine described Gizoni's job duties in detail.

An attachment to the declarations included an Employee's Claim for Compensation, United States Department of Labor, Office of Workers' Compensation Programs (OWCP), Form LS-203. That form was filed by Gizoni with the United States Department of Labor, OWCP, to obtain further compensation benefits pursuant to the LHWCA.

Oral argument was heard before the District Court on July 5, 1988. The Court filed its Order Granting Motion for Summary Judgment on September 16, 1988.

On September 16, 1988, Gizoni filed a Notice of Appeal of the District Court judgment to the United States Court of Appeals for the Ninth Circuit. On or about February 28, 1989, Gizoni submitted his brief to the court. On May 22, 1989, Southwest Marine and amicus curiae, consisting largely of maritime employers, filed their briefs. The parties argued before the Ninth Circuit on March 9, 1990. On July 24, 1990, the Ninth Circuit filed its decision which reversed the judgment of the District Court.

FACTUAL DISCUSSION

Southwest Marine operates a ship repair facility in San Diego, California. Southwest Marine provides ship repair services to ocean-going vessels owned by the United States Navy and commercial vessel owners.

In connection with Southwest Marine's ship repair activities, it owns several floating platforms which are used at Southwest Marine's shipyard. Southwest Marine uses floating platforms to position tools, equipment and supplies alongside vessels during repairs. The platforms are used to hold anchor chains, anchors, rudders, propellers and shafts removed from or installed on vessels at Southwest Marine's shipyard. One floating platform holds a

sandblasting facility and is generally maintained at one location at the Southwest Marine shipyard.

Many of the floating platforms are simply used to provide additional work space at Southwest Marine's shipyard. Southwest Marine's floating platforms do not have means of self-propulsion or steering, raked bows, navigation lights, or crew facilities of any type. Virtually every employee of Southwest Marine has walked across or worked on a floating platform during his employment due to the nature of the ship repair business.

Gizoni worked as a rigger and rigger foreman during his employment with Southwest Marine. He was under the direct supervision of the superintendent of the rigging department, John West. Gizoni's duties as a rigger foreman required him to supervise and participate in the movement of equipment, materials, supplies, and vessel components onto and off of vessels repaired at Southwest Marine's shipyard.

Gizoni was never assigned to any vessel and never worked aboard vessels except to perform specific duties relating to the ship repair work that his employer was performing for the vessel owner. Gizoni had no duties relating to the navigation of any vessel.

Riggers occasionally perform line handling functions when Southwest Marine's floating platforms are moved from place to place in the shipyard. The participation by riggers in line handling is limited to receiving lines passed to the platform by the ship's crew and placing those lines over the bits on the platform. Gizoni's participation in line handling functions consumed less than one percent of his total work time.

Prior to April 6, 1987, a floating platform was secured to the apron of Southwest Marine's floating drydock, and to the rear of a Navy vessel which was in the shipyard for repair. The platform had been placed in that position in anticipation of repair work to be performed on the rudder of the Navy vessel.

Gizoni alleges that shortly after reporting for work on April 6, 1987, he walked onto the floating platform and was injured when his foot fell through a hole in the floating platform. As set out above, Gizoni has filed a Longshore claim and has been provided medical and compensation benefits by Southwest Marine pursuant to the LHWCA.

ARGUMENT

IMPORTANCE OF CASE

This case is of paramount importance to Southwest Marine, and indeed to every employer who employs ship repairmen, ship builders, stevedores or other employees specifically covered by the Longshore Act. The importance of the case rests on its practical effect. Virtually every shipyard, ship repair yard, stevedoring outfit and other waterfront employer must now procure two entirely different types of insurance for each and every one of its employees.

Furthermore, the state of the law since the Gizoni decision makes it possible that an employee could be awarded benefits under both the LHWCA and the Jones Act. The employer bears the cost of administering and defending those inconsistent claims and the courts of this country are forced to utilize limited judicial resources to address those inconsistent claims.[5]

That burden on employers flies in the face of the intent behind the 1972 amendments to the Longshore Act. As a result of the 1972 amendments, civil actions for unseaworthiness, formerly

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[5]In the *Report of the Federal Courts Study Committee*, it was noted that in 1987 and 1988 FELA and Jones Act cases together accounted for about five percent of all federal civil trials and about eight percent of all federal civil jury trials. *Report of the Federal Courts Study Committee* (April 2, 1990) Part II, Chapter 3, p. 62. Should the Ninth Circuit's decision in this matter stand, those numbers will surely increase.

available to all maritime workers, were taken away from longshore and harbor workers. Congress instructed that land-based maritime workers were to be treated as other land based workers and that only "seamen" were to be treated differently:

> [t]he seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. *The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel* . . . [t]he purpose of the amendment is to place an employee injured aboard a vessel in the same position he would be if injured in non-maritime employment ashore . . . and not endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called. . . .[6] [Emphasis Supplied.]

Thus, allowing land-based maritime workers to proceed with seamen's personal injury claims (Jones Act claims) against their employers is simply inconsistent with the rationale for precluding unseaworthiness claims by such land-based maritime workers.

The Court is therefore asked to enunciate the standard by which the maritime industry and the courts can determine whether a particular worker is deemed a longshoreman or harbor worker

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[6]S.Rep. No. 1125, 92d Cong., 2d Sess. 9-10 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 6 (1972); *reprinted in* U.S. Code Cong. & Admin. News, 4703.

subject to the provisions of the LHWCA[7] *or* a seaman capable of suing his employer pursuant to the Jones Act[8] and general maritime law. That issue is of paramount importance to all maritime employers, employees and related businesses because of the need to quickly and efficiently determine whether a particular employee falls under the LHWCA or the Jones Act.[9]

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[7]It is well settled that the Jones Act and the LHWCA are mutually exclusive. *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

[8]The Court recently accepted certiorari in the case of *Wilander v. McDermott Intern., Inc.*, 887 F.2d 88 (5th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S.Ct. 3212 (1990), which concerns similar issues addressed by the Fifth Circuit. The present case is different, however, in that the plaintiff in *Wilander* was *not* covered by the LHWCA. He was a paint foreman working on a fixed platform *overseas* and was thus not covered by any American worker's compensation law. *Id.* at 89. The issues presented in the present case, more common than those presented in *Wilander*, have been the source of great confusion. The *Wilander* case is the first case on the issue of seaman's status that the Court has agreed to address in well over 20 years. Petitioner suggests that the instant case would be an excellent companion case to the *Wilander* case and would provide the Court with the opportunity to resolve at one time the widest range of issues relating to Jones Act coverage cases.

[9]Indeed, continued confusion over whether an employee is covered by the LHWCA or the Jones Act could prompt many employers to simply controvert Longshore compensation payments on the grounds that the employee is excluded from LHWCA coverage as a member of a crew of a vessel. *See*, 33 U.S.C. §§ 902(3)(G), 914(d). That would be contrary to one of the primary reasons behind the LHWCA, that is, assuring prompt and voluntary compensation and medical treatment to injured maritime employees for work-related injuries when they are perhaps most in

(continued...)

The uncertainty of the law in this area has created an unreasonable economic burden on an industry which is already troubled by financial problems associated with foreign competition and overregulation. The decision of the Ninth Circuit threatens to undermine one of the prime purposes of the LHWCA,[10] which is to provide a prompt and expeditious remedy for work-related injuries to those maritime workers thought by Congress to work in an area in which neither the Jones Act or state workers' compensation acts may provide coverage.[11]

The current state of the law has made it possible for a number of plaintiffs, similarly situated to Gizoni, to initially collect generous benefits under the LHWCA without regard to their own negligence, the lack of negligence of their employers, or any other fault concept. Those employees are then able to sue their employers for general damages pursuant to the Jones Act or the general maritime law by alleging seaman status.[12]

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[9](...continued)
need of assistance. In addition, continued confusion would require most shipyard employers to carry double coverage -- LHWCA and Jones Act -- and thus require the industry to bear additional costs when that industry is already burdened by tremendous costs.

[10]It should be noted that in California alone several shipyards have gone out of business due in part to foreign competition and in part to the rising cost of providing LHWCA coverage, along with litigation costs. It is anticipated that if that situation is allowed to continue, many more yards may be lost. Clearly, the loss of jobs and income to foreign competition, and the loss of a strategic national security-related resource, is not in the national interest.

[11]*See, Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

[12]Some commentators have suggested that counsel for plaintiffs may even have an "obligation" to pursue seaman's status, and at (continued...)

That result encourages maritime employees and employers alike to engage in "claimsmenship," rather than voluntary resolution of disputes. As an example, if an employer anticipates a civil suit alleging seaman status, the employer may refrain from voluntary payment of LHWCA benefits, prior to a "judicial" determination of the employee's status, on the grounds that the employee may be excluded from LHWCA coverage as a member of a crew of a vessel.[13]

As recognized by the California Legislature, "judicial" determinations are not always prompt.[14] Consequently, when an employee is most in need of LHWCA benefits, such benefits may be controverted if there is an issue of LHWCA coverage due to ambiguities as to the employee's seamen's status.[15] Likewise, employees may be encouraged to accept voluntary payments

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[12](...continued)
the same time attempt to preserve LHWCA rights in the event the seaman's claim fails. The contingency fees available under the Jones Act encourage such action. *See*, Bull, *Seaman Status Applied: A Practice Guide To Status Determination*, 1 U.S.F. Maritime Law Journal 43, 113 (1989).

[13]Under the LHWCA, members of a crew of a vessel *are excluded* from LHWCA coverage. 33 U.S.C. § 902(3)(G). However, an administrative determination by an administrative law judge or the Benefits Review Board of the U.S. Department of Labor regarding an employee's status may not prevent a later contrary finding in the civil courts. *See, Simms v. Valley Line Co.*, 709 F.2d 409, 413, n.6 (5th Cir. 1983).

[14]Trial Court Delay Reduction Act of 1986; Cal. Gov't Code §§ 68600 *et seq.*

[15]The seamen's status test is generally regarded as similar, if not equivalent, to the test for exemption from the Longshore Act for masters and members of crews of a vessel. *Pennsylvania R. Co. v. O'Roarke*, 344 U.S. 334, 337-338 (1953); *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 983 (5th Cir. 1987).

pursuant to the LHWCA or make a claim for such benefits and thereafter file a Jones Act complaint against their employer.

Nevertheless, seaman's claims do not involve "no fault" benefits which are payable pursuant to the LHWCA. Proof of negligence is essential to recovery under the Jones Act.[16] Although seamen have also traditionally been entitled to medical treatment at their employer's expense[17] as well as a "subsistence allowance" ("maintenance") for compensation for room and board normally received aboard their seagoing vessel, those benefits are not compensation for injuries or illness.[18]

One can readily conclude that employers, no longer assured the reciprocal benefit of a bar against a Jones Act claim by an employee, would be inclined to treat as seamen employees who are injured through no fault of the employers. Consequently, the employees that Congress intended to benefit would be denied their LHWCA benefits due to their proximity to boats and the

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[16]*Jacob v. New York*, 315 U.S. 752, 755 (1942).

[17]Until recently, medical treatment costs were paid through the United States Public Health Service Hospitals. 42 U.S.C. § 249.

[18]Several cases have suggested that maritime employees who maintain homes year-round (like harbor workers and longshoremen) need not be provided with the lodging component of their maintenance and cure benefit. Similarly, cases have suggested that seamen who are not provided board by their employers are not entitled to any component of the "maintenance" benefit associated with board. Consequently, seamen who live ashore, maintain housing ashore and eat ashore at their own cost, rather than at their employers' expense, are not entitled to maintenance. *Crooks v. United States*, 459 F.2d 631, 634 (9th Cir. 1972); *see* Norris, *The Law Of Maritime Personal Injuries*, Vol. 1, § 13 (3rd ed. 1975).

waterfront (unless they vigorously litigated their status).[19] That is the exact problem that Congress intended to resolve for those employees in 1927 by enacting the LHWCA, and again by amending the LHWCA in 1972 and 1984.

The lack of a clear delineation between Jones Act plaintiffs and Longshore Act claimants opens the door for abuse.[20] That is obviously contrary to the intent of Congress, which was to create a system in which employees would be covered and compensated under the Longshore Act or the Jones Act, *but not both*. Indeed, the Supreme Court, as well as the lower courts, have acknowledged that employees should not be covered by both the Jones Act and Longshore Act.[21]

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[19]In essence, LHWCA benefits which otherwise would have been quickly provided to employees would be delayed and eventually shared with attorneys who litigated the Jones Act claims for those employees.

[20]The confusion over which employees are Jones Act seamen versus land-based maritime workers has also depleted judicial resources at a time when the courts are already overburdened and lengthy delays for court time are common. Culp, *Fixing the Federal Courts*, ABA Journal, June 1990, page 63; Kaufman, *Crisis in the Courts*, California Lawyer, August 1990, page 28.

[21]*See, e.g., South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940); *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048, 1050 (5th Cir. 1988); *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84, 89 (N.D. Cal. 1978).

However, *Wenzel v. Seaward Marine*,[22] upon which the Ninth Circuit relied, has encouraged many employees and their attorneys to simultaneously prosecute LHWCA and seaman's claims for the same injury. The decision of the Ninth Circuit in the instant case would assure plaintiffs that they would not be stopped short of a jury, even based on the flimsiest of facts. That is precisely the type of mischief which Congress attempted to remedy through its amendments to the LHWCA.

Indeed, the LHWCA must be interpreted with an eye toward the mischief to be resolved.[23] In the present case, the Ninth Circuit's decision places an unreasonable burden on the harbor marine and ship repair industry, not to mention the burden on the courts because of the frequent need to use court time. That burden includes double insurance costs, double administration costs and double defense costs. That is despite the fact that both programs are costly in and of themselves, and despite a specific legislative intent to avoid creating such an overlap.[24] The current situation only benefits maritime attorneys who have an incentive to litigate the seaman's status issue.

The intolerable situation noted above has created a class of workers who have the best of both worlds, to the detriment of the stevedoring, ship repair and harbor marine industry. That class consists of workers who are clearly not Jones Act seamen

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[22]*Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983). In *Wenzel*, the Ninth Circuit found that a diver involved in scraping the hull of a naval vessel was entitled to have his Jones Act seaman's status determined by a jury. However, the vessel to which he claimed assignment was essentially a small underwater vacuum cleaner used for cleaning the hulls of naval vessels. Indeed, the vacuum cleaner was not even in the water on the day of the injury. Thus, the flimsiest of facts enabled the plaintiff in that case to get to the jury.

[23]*South Chicago Coal, supra*, 309 U.S. at 259.

[24]*Bertrand, supra*, 700 F.2d at 243.

precluded from LHWCA benefits and also not true longshore and harbor workers precluded from generous seamen's benefits. Those employees fall into the overlap between the Jones Act and the LHWCA. In many cases, those employees can obtain LHWCA remedies from the day of injury while at the same time litigating their seaman's status. They enjoy the security of the "no-fault" LHWCA remedies while rolling the dice, at little or no cost, for seaman's remedies not otherwise available to the other land-based LHWCA workers.[25]

Southwest Marine requests that the Court make every effort to effectuate the legislative intents behind the LHWCA and the Jones Act. It therefore requests that the Court grant certiorari and articulate uniform and dependable criteria[26] for seaman's status which can be used to: (1) assure that all employers have obtained correct and sufficient insurance coverage for employees other than those who are members of the crew of a vessel; (2) assure that those same employees promptly receive the compensation benefits to which they are entitled under the LHWCA, without the need for litigation to determine the issue of employee status as a seaman or employee covered by the LHWCA; and (3) assure that employers, who have traded away many employer liability defenses and who have undertaken the burden of paying injured workers extremely generous "no fault" disability benefits pursuant to the LHWCA, receive what they were given in exchange, i.e. immunity from tort liability.[27]

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[25]1 U.S.F. Maritime Law Journal 43, 115.

[26]The criteria should take in account the intent of both Acts and resolve the question of who is covered by the LHWCA and who is covered by the Jones Act, or at the very least ensure that the same test is applied in both the Longshore and Jones Act forums.

[27]*See* 33 U.S.C. § 905(a). The mere fact that Gizoni was able to file this suit, which has cost Southwest Marine significant attorneys' fees and costs in defense after receiving benefits pursuant to the LHWCA, underscores the importance of the issues addressed in this petition.

THE CURRENT STATE OF THE LAW

The Jones Act is an employer liability statute. It permits recovery by a *seaman* against his employer for injuries sustained in the course of employment occasioned by the employer's negligence. Southwest Marine maintains that Gizoni is simply not eligible to recover under the Jones Act because he is not a seaman. The Jones Act provides in relevant part:

> Any *seaman* who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . . [46 U.S.C. § 688.] [Emphasis supplied.]

The term "seaman", however, is not defined by the Jones Act. Instead, *Congress left it to the courts to fashion a definition and the result has been that different circuit courts have utilized different definitions.*[28] In 1926, the United States Supreme Court held that the term "seaman" was broad enough to include longshoremen who were employed in maritime service customarily rendered by the ship's crew.[29]

However, Congress apparently did not agree that the Jones Act should have such broad application. Consequently, months after the *Haverty* decision, Congress passed the LHWCA to provide a separate, comprehensive compensation scheme for maritime workers who were not "members of a crew of any vessel." Indeed, members of a crew of a vessel were specifically excluded

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[28]The legislative history of the Jones Act suggests that, despite what the courts have fashioned, Congress intended that Jones Act remedies be limited to those workers whose jobs entail the particular hardships only experienced by those who work at sea. *See* H.R. Rep. No. 639, 67th Cong., 2d Sess. 9 (1922); S. Rep. No. 94, 67th Cong., 1st Sess. 1 (1921); 62 Cong. Rec. 7754 (1922).

[29]*International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926).

from LHWCA coverage. Thus, one of the prime purposes of the LHWCA was to provide a compensation scheme for employees who fell through the cracks and were not covered by the Jones Act or state workers' compensation acts.[30]

Congress' gift to the courts of the responsibility for determining a definition of seaman combined with the lack of recent guidance from the Court has created an intolerable situation for the shipping industry. That is, the circuits apply different tests for determining who is a Jones Act seaman. In fact, there may be a difference in the test used, even in the same federal circuit, for determining Jones Act seamen and members of a crew of a vessel excluded by the LHWCA. For example, in California the federal courts follow *Wenzel v. Seaward Marine Services*, *supra*, and the California state courts follow the Fifth Circuit's *Offshore Company v. Robison* test.[31] Thus, an employee may be a seaman if he chooses to file in state court and a harbor worker if he files in federal court.[32]

The First,[33] Fifth[34] and Eighth[35] Circuits apply versions of the "special purpose" test (also known as the "two prong" test),

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[30]*Sun Ship*, *supra*, 447 U.S. at 715.

[31]*Soucie v. Trautwein Brothers*, 275 Cal. App. 2d 20, 25 (1969), *citing Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

[32]*See*, *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983); *Baker v. Far East Lines, Inc.*, 451 F.Supp. 84, 87 (N.D. Cal. 1978); *Soucie*, *supra*, 275 Cal. App. 2d at 25.

[33]*Bennett v. Perini Corporation*, 510 F.2d 114, 116 (1st Cir. 1975).

[34]*Offshore Company*, *supra*, 266 F.2d at 769.

[35]*Miller v. Patton-Tully Transp. Co., Inc.*, 851 F.2d 202, 204 (8th Cir. 1988).

first announced in *Offshore Company v. Robison*. That test requires that the plaintiff be employed aboard a "vessel" or a special purpose vessel, "in navigation," that he perform a "substantial part" of his work on the "vessel," and that his duties "contribute to the function or mission" of the vessel. *Id.* Significantly, the Fifth Circuit test is *also* different from the test applied by the U.S. Department of Labor and courts when determining whether an employee is a member of a crew of a vessel pursuant to the LHWCA.[36] Indeed, the Fifth Circuit Jones Act test is different from the Fifth Circuit test for determining a member of a crew of a vessel.[37] Therefore, in California and in the First, Fifth and Eighth Circuits, it is possible for an employee to be both an employee covered by the LHWCA and a Jones Act seaman.

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[36]Compare, *Hed v. Duncanson-Harrelson Co.*, 7 BRBS 821 (1978), aff'd *sub nom. Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827 (9th Cir. 1981); *McDermott, Inc. v. Boudreaux*, 679 F.2d 452 (5th Cir. 1982).

[37]*Compare, McDermott, supra*, 679 F.2d at 452; *McIntosh v. Parkhill-Goodloe Co., Inc.*, 4 BRBS 3 (1976), *aff'd mem.*, 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).

The Second,[38] Third,[39] Fourth,[40] Sixth,[41] Seventh,[42] Ninth[43] and Eleventh[44] Circuits generally follow a version of the "aid in navigation test" (also known as the "three prong" test). As applied by the Ninth Circuit in 1983, that test has the following three prongs:

> (1) The vessel on which the claimant was employed must be in navigation;
>
> (2) The claimant must have a more or less permanent connection with the vessel; and
>
> (3) The claimant must be aboard primarily to aid in navigation.[45]

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[38]*Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2nd Cir. 1975).

[39]*Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960, 964 (3rd Cir. 1979), *cert. denied*, 444 U.S. 833 (1979).

[40]*Whittington v. Sewer Construction Co., Inc.*, 541 F.2d 427, 436 (4th Cir. 1976).

[41]*Noack v. American Steamship Company*, 491 F.2d 937, 939 (6th Cir. 1974).

[42]*Johnson v. John F. Beasley Const. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

[43]*Wenzel, supra*, 709 F.2d at 1327.

[44]*Carusco v. Sterling Yacht & Shipbuilders, Inc.*, 828 F.2d 14, 15 (11th Cir. 1987).

[45]*Wenzel, supra*, 709 F.2d at 1327.

The Ninth Circuit has continued to cite the *Wenzel* decision as providing the proper test for seaman status in the Ninth Circuit.[46]

Under the Ninth Circuit's test, an employee must affirmatively prove *all* of the elements of the test to establish that he is a seaman, and the plaintiff's failure to establish even one of those elements requires a finding that the plaintiff is not a seaman as a matter of law.[47]

NINTH CIRCUIT ERROR IN LIGHT OF THE LAW OF THE CIRCUIT AND THE SUPREME COURT

A review of the Court's decision in *South Chicago Coal* and the Fifth Circuit's decision in *Pizzitolo v. Electro-Coal Transfer Corporation*[48] highlights the error of the Ninth Circuit in this case. In *South Chicago Coal*, the Court simply held that Jones Act seamen were "those employees on the vessel who are naturally and primarily on board to aid in navigation."[49] Clearly, under that simple test a harbor bound rigger employed by a ship repair company is not a Jones Act seaman.

In *Pizzitolo*, the Fifth Circuit followed the Supreme Court's lead in *South Chicago Coal* and announced a test which focuses on

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[46]*See e.g., Omar v. Sea-Land Services, Inc.*, 813 F.2d 986, 988 (9th Cir. 1987); *Craig v. M/V PEACOCK*, 760 F.2d 953, 956 (9th Cir. 1985). However, as noted above, the California superior courts have apparently adopted portions of the Fifth Circuit's test. *Compare, Wenzel, supra*, 709 F.2d at 1327; *Soucie, supra*, 275 Cal. App. 2d at 20.

[47]*Buna v. Pacific Far East Line, Inc.*, 441 F.Supp. 1360, 1366 (N.D. Cal. 1977).

[48]812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988).

[49]*South Chicago Coal, supra*, 309 U.S. at 260.

whether the employee is covered by the LHWCA.[50] The Fifth Circuit explained that the LHWCA "specifically covers any harbor worker, including a ship repairman . . . ," and that "[t]he language of the LHWCA thus strongly supports, indeed arguably demands, the conclusion that a harbor bound ship repairman is as a matter of law not a 'member of a crew' and thus not a Jones Act seaman."[51] That is the test that should have been followed by the Ninth Circuit. It is in line with the Court's reasoning in *South Chicago Coal* and consistent with the legislative intent behind the LHWCA, its amendments and the Jones Act.

However, the Ninth Circuit's error in this case is not simply based on the misapplication of its seaman's test. Instead, the court

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[50]The *Pizzitolo* test focuses on the employee's occupation, i.e., whether or not the employee is a ship repairman. That is consistent with the other rulings of the Court -- *Chesapeake and Ohio Railway Co. v. Schwalb*, ___ U.S. ___, 110 S.Ct. 381 (1989), *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), and *Pennsylvania Railroad Company v. O'Roarke*, 344 U.S. 334 (1953). In *Chesapeake*, the Court noted that:

> We also reiterated in *Herb's Welding v. Gray, supra*, that the maritime employment requirement as applied to land-based work other than longshoring and the other occupations named in § 902(3) is an occupational test focusing on loading and unloading. Those not involved in those functions do not have the benefit of the . . . [LHWCA]. [*Id.* at 385.]

As in *Chesapeake, Herb's Welding, O'Roarke* and *Pizzitolo*, Petitioner requests that the Court adopt a standard for determining seaman's status which focuses on the employee's occupation -- in this case -- a rigger and not a seaman.

[51]*Pizzitolo, supra*, 812 F.2d at 983.

completely abdicated application of any test.[52] Although the Ninth Circuit enunciated a test in *Wenzel* which is consistent with the tests set forth by the United States Supreme Court, the Ninth Circuit has refused to consider whether Gizoni was indeed a harbor worker, which includes a ship repairman, not eligible for consideration as a seaman.

In the instant case, Gizoni has argued that summary judgment is virtually never appropriate in a seaman's case since seamen status cannot be determined as a matter of law. However, the United States Supreme Court and the federal circuit courts have routinely disagreed. The Ninth Circuit nonetheless concluded that it was bound by the *Wenzel* decision and essentially agreed with Gizoni. However, there are not any decisions which support the proposition that seaman's status can never be determined as a

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[52]It is interesting to note just how far the Ninth Circuit has strayed. In *Moore Drydock Co. v. Pillsbury*, 100 F.2d 245 (9th Cir. 1938), the court noted that:

> A stevedore or longshoreman has no connection with the ship. He has not bound himself to its service. He does not serve as a member of its crew, but performs . . . a duty that formerly was ordinarily done by the crew, not upon the high sea, but at the ship's destination, minus the perils of the voyage. He does not undergo the hardships and dangers, nor does he surrender his personal rights and liberties that a seaman does in binding himself to the vessel . . . . [*Id.* at 247.]

Again, emphasis was placed on separating those who were the intended recipients of seaman's remedies from those who had no need of such special protection. *See*, 1 U.S.F. Maritime Law Journal 43, 67.

matter of law. Indeed, the normal summary judgment procedures remain applicable.[53]

Furthermore, the decision of the Ninth Circuit suggests that *any* shipyard worker or harbor worker is entitled to proceed to a jury trial on his seaman's claim. Consequently, the Congressional intent underlying the LHWCA has been disregarded due to the Ninth Circuit's refusal to apply a normal procedural device.

Until recently, no court has even suggested that the normal procedural devices, including summary judgment, do not apply to the seaman's status issue. As a result, maritime employers, such as shipyards and ship repair companies whose employees have for the most part been traditionally covered by the LHWCA, as well as the courts, now face a flood of Jones Act claims and litigation.

CONCLUSION

For the reasons set forth above, the Ninth Circuit's decision is inconsistent with the Congressional intent behind the LHWCA, the Jones Act, and the Court's opinions concerning seaman's status. As set out above, the Ninth Circuit decision in this case requires the shipping industry to obtain "dual insurance" (Longshore and Jones Act) for each employee and incur substantial costs. The shipping industry, already suffering financially, is in danger of collapsing under that burden. Consequently, a decision of the Court clarifying the test to be used for determining seaman's status is necessary to the continued viability of this country's strategic maritime industry, which clearly includes the shipbuilding and ship repair industries. Such a decision would also help to reduce the current strain on judicial resources which the constant relitigation of those issues has caused.

Petitioner therefore requests that the Court affirm its holding in *South Chicago Coal* by adopting the *Pizzitolo* test for seaman

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[53]*Garret v. Dean Shark Drilling Co., Inc.*, 799 F.2d 1007, 1009 (5th Cir. 1986); *Offshore Company*, *supra*, 266 F.2d at 778.

status -- a test that is both consistent with the intent of Congress and fair to both the shipping and maritime industry and its employees. The Ninth Circuit's decision to the contrary should be reversed.

Respectfully submitted,

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By JAMES J. MCMULLEN, JR.

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APPENDIX I

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BYRON GIZONI, Plaintiff, v. SOUTHWEST MARINE, INC., Defendant.	Civil No. 87-1424-GT(CM) ORDER FOR ENTRY OF SUMMARY JUDGMENT

The motion of defendant, SOUTHWEST MARINE, INC., for Summary Judgment on the basis that plaintiff is not a "seaman" entitled to bring an action pursuant to the Jones Act, or in the alternative, that plaintiff is a harbor worker and therefore precluded from bringing this action pursuant to the exclusive remedy provisions of the Longshoremen's and Harbor Workers' Compensation Act, came on regularly for hearing before this court in Courtroom One, on July 5, 1988, at 10:30 a.m. before the Honorable Gordon Thompson, Jr., Chief Judge. James J. McMullen, Jr. of Littler, Mendelson, Fastiff & Tichy appeared as attorney for defendant, and Preston Easley appeared as attorney for plaintiff.

After full consideration of all the evidence and Points and Authorities submitted by both parties, and oral arguments of counsel, the court finds that there is no triable issue of material fact and the defendant is entitled to judgment as a matter of law.

The findings of this court are based upon the ground that plaintiff was not a "seaman" entitled to bring an action pursuant to the Jones Act because defendant's floating platforms were not

"vessels in navigation" and plaintiff was not aboard such platforms to "aid in navigation," but to perform work as a ship repairman. Specifically, the court relied upon the case of Estate of Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326 (9th Cir. 1980) wherein the Ninth Circuit set out the three-prong test for determining seaman status in this circuit.

Further, plaintiff as a harbor worker, is precluded from bringing this action by the exclusive remedy provisions of the Longshoremen's and Harbor Workers' Compensation Act.

IT IS SO ORDERED.

Dated: SEP 14 1988

GORDON THOMPSON, JR., Chief Judge
United States District Court

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Byron Gizoni — JUDGMENT IN A CIVIL CASE

v.

Southwest Marine, Inc.

CASE NUMBER 87-1424-GT(CM)

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Summary judgment is entered on the basis that plaintiff is not a "seaman" entitled to bring action pursuant to the Jones Act. Judgment is in favor of the defendant.

9/16/88 — *Date*

WILLIAM W. LUDDY — *Clerk*

Tina R. Helart — *(By) Deputy Clerk*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BYRON GIZONI, Plaintiff-Appellant, v. SOUTHWEST MARINE, INCORPORATED, Defendant-Appellee.	)	No. 88-6666 D.C. No. CV-87-1424-GT OPINION

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, District Judge, Presiding

Argued and Submitted
March 9, 1990 -- Pasadena, California

Filed July 24, 1990

Before: William C. Canby, Jr. and Edward Leavy,
Circuit Judges, and E. Dean Price,* District Judge.

Opinion by Judge Canby

*The Honorable E. Dean Price, United States District Judge for the Eastern District of California Sitting by Designation.

COUNSEL

Preston Easley, San Pedro, California, for the plaintiff-appellant.

James McMullen, Littler, Mendelson, Fastiff & Tichy, San Diego, California, for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

Appellant Byron Gizoni appeals the district court's ruling on summary judgment that as a matter of law he is not a "seaman" under the Jones Act, 46 U.S.C. § 688, but a harbor worker precluded from recovering under the Jones Act by the exclusive remedy provision of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"). We reverse and remand.

FACTS

Appellee Southwest Marine, Inc., operates a ship repair facility in San Diego, California. In connection with its ship repair activities, Southwest Marine owns several floating platforms. These platforms by themselves have no power, means of steering, navigation lights, navigation aids, or facilities for crew. They are moved about by tugboats, which position the platforms alongside vessels that are being repaired at berths or in dry dock at Southwest Marine's shipyard or at the nearby Naval Station. So placed, the platforms support workers engaged in ship repair, along with necessary materials and equipment. Those materials are equipment are usually loaded onto the platform before it is tugged into position.

Gizoni was a rigging foreman employed by Southwest Marine. In that capacity, Gizoni worked on the platforms supervising other riggers and riding the platforms as they were used to move equipment, materials, supplies, and vessel components around the shipyard and on to and off of vessels being repaired. Gizoni occasionally served as a lookout and gave maneuvering signals to the tugboat operator when the platforms were moved. He also received lines passed to the platforms by the ships' crews to secure the platforms.

Gizoni was injured when his foot broke through a thin wooden sheet covering a hole in the deck of a platform being used to

transport a rudder from the shipyard to a floating drydock. He suffered disabling leg and back injuries in the fall and is unable to work. Shortly thereafter, Gizoni made a claim for and received medical and compensation benefits from Southwest Marine pursuant to the LHWCA. Later, he filed suit against Southwest Marine under the Jones Act alleging that he was a seaman injured due to the negligence of his employer. Southwest Marine brought a motion for summary judgment asserting that Gizoni was not a "seaman" for purposes of the Jones Act and that this claim was barred by the exclusivity provisions of the LHWCA, 33 U.S.C. § 905(a). The district court granted the motion on both grounds.

STANDARD OF REVIEW

We review de novo a grant of summary judgment, *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir.) *cert. denied*, ___ U.S. ___ (1990). We uphold summary judgment where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the district court correctly applied the relevant substantive law. *Judie v. Hamilton*, 873 F.2d 919, 920 (9th Cir. 1989).

ANALYSIS

A. Status as a Jones Act Seaman

Under the Jones Act, status as a "seaman" depends on three factors: (1) the vessel on which the claimant was employed must be in navigation; (2) the claimant must have a more or less permanent connection with the vessel; and (3) the claimant must be aboard primarily to aid in navigation. *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 393 (9th Cir. 1973)(the "*Bullis* test"). Gizoni first contends that the district court erred in ruling that he failed to satisfy this test as a matter of law. We agree.

Whether a claimant is a seaman is typically a question for the jury, where there is an evidentiary basis for such a finding. *Omar*

v. Sea-Land Service, Inc., 813 F.2d 986, 988 (9th Cir. 1987); *see also Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374 (1957). "There is an 'evidentiary basis' for determining a plaintiff's status as a seaman when, for example, parties dispute whether the ship was in navigation or whether the employee was actually a member of the ship's crew." *Omar*, 813 F.2d at 988. These and other questions are in dispute in this case.

Moreover, we are bound to follow our decision in *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983), which controls here, Wenzel was a diver/tender employed by Seaward Marine Services to clean the hulls of Navy ships. The divers cleaned the hulls using hand-held scrapers and a SCAMP -- a submerged cleaning and maintenance platform. The SCAMP was a saucer-shaped unit 6 feet in diameter and 20 inches deep. It traveled underwater along the ship's hull and could be operated manually by divers. During one of his dives, Wenzel died of asphyxiation. He was not using the SCAMP at the time. His estate filed a Jones Act claim against Seaward. Seaward filed a motion for summary judgment arguing that Wenzel was a harbor worker, not a seaman, and the district court granted the motion. We reversed and remanded, concluding that Wenzel's status as a seaman under the *Bullis* test and whether the SCAMP was a vessel were each close questions of fact which should have been determined by the jury.

We see no reasonable basis for distinguishing this case from *Wenzel*. The SCAMP is no more clearly a vessel in navigation than are the platforms used by Southwest Marine. Nor was Wenzel's relationship with the SCAMP any more permanent than Gizoni's relationship with the platforms. Wenzel, who was not even using the SCAMP at the time of his death, did not aid in its navigation any more clearly than Gizoni aided in the navigation of the platforms. Thus, under *Wenzel*, the question whether Gizoni was a Jones Act seaman should have been put to a jury.

B. Exclusive Remedy Provision of the LHWCA

The district court's second basis for granting summary judgment was that Gizoni was a harbor worker precluded from suing under the Jones Act by Section 5(a) of the LHWCA. That section provides in part: "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee. . . ." 33 U.S.C. § 905(a). Thus, an employee covered by the LHWCA is precluded by this provision from bringing any other cause of action, including a Jones Act claim, against an employer for injuries on the job. *See South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940); *Arvidson v. Dillingham Corp.* 462 F.2d 1, 4 (9th Cir.), *cert. denied*, 409 U.S. 983 (1972).

The LHWCA described the class of workers covered by the statute as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel. . . .

33 U.S.C. § 902(3). Southwest marine contends that because Gizoni's work involves primarily ship repair, he is covered explicitly by the provisions of the LHWCA and, consequently, is precluded from bringing an action against Southwest marine under the Jones Act.

In *Petersen v. Chesapeake and Ohio Railway Co.*, 784 F.2d 732 (6th Cir. 1986), the Sixth Circuit addressed the question whether the LHWCA provides the sole remedy for a ship repairman injured as a result of his employer's negligence. The plaintiff in *Petersen* had brought a Jones Act claim against his employer to recover for injuries sustained as a result of his exposure to asbestos on the job. Petersen was a machinist who

repaired equipment and machinery on ferries. He did most of his work in dry dock but spent approximately thirty percent of his work time repairing car ferry engines while the ferries were sailing. After trial, the district court entered judgment on a jury verdict in favor of Petersen. On appeal, the employer argued that Petersen's sole remedy was under the LHWCA. The Sixth Circuit stated: "A plaintiff is not limited to the remedies available under the LHWCA unless he is unable to show that a genuine factual issue exists as to whether he was a seaman at the time of his injury." *Id.* at 739. Applying a three-part test identical to the *Bullis* test, the court concluded that there was enough evidence for the jury to conclude that Petersen was a Jones Act seaman. Thus, Petersen was not limited to the remedies available under the LHWCA despite the fact that his work consisted primarily of repairing ships in dry dock. *Id.*

We join the Sixth Circuit in rejecting the notion that any person whose work involves ship repair is necessarily restricted to coverage under the LHWCA. Whether an employee is covered by the LHWCA or the Jones Act should be determined by looking to the nature of the claimant's job title. Moreover, by its terms, the LHWCA does not cover "a master or member of a crew of any vessel." 33 U.S.C. § 902(3). The term "master or member of a crew" in the LHWCA is the equivalent of "seaman" in the Jones Act. *See Petersen*, 784 F.2d at 739; *see also McDermott, Inc. v. Boudreaux*, 679 F.2d 452, 455 (5th Cir. 1982); *Travelers Insurance Co. v. Belair*, 412 F.2d 297, 302 (1st Cir. 1969). Thus, Gizoni is covered by the LHWCA only if he is not a seaman. As we ruled earlier, the question whether Gizoni is a Jones Act seaman should have been presented to a jury. Accordingly, we reverse the order granting summary judgment and remand for a jury trial on the question of Gizoni's status and coverage under the compensation statutes.

REVERSED AND REMANDED.

APPENDIX III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
GORDON THOMPSON, JR., JUDGE PRESIDING

BYRON GIZONI, Plaintiff,	Civil No. 87-1424-GT
v.	
SOUTHWEST MARINE, INC., Defendant.	SAN DIEGO, CALIFORNIA JULY 5, 1988

HEARING ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

APPEARANCES:

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COURT REPORTER:	Ann Butcher U.S. Courthouse, Department One 940 Front Street San Diego, California 92189

San Diego, California, Tuesday, July 5, 1988, 10:30 a.m.

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THE CLERK: No. 11 on calendar, Case No. 87-1424, Byron Gizoni versus Southwest Marine Incorporated, defendant's motion for summary judgment.

MR. EASLEY: Good morning, your honor. Preston Easley appearing for the plaintiff Byron Gizoni.

MR. McMULLEN: Good morning, your honor. Jim McMullen for Southwest Marine.

THE COURT: This is a motion by the defendant for summary judgment.

Does the Defendant have anything to add to their motion papers?

MR. McMULLEN: Yes, I do, your honor. Just very briefly.

The cases following *South Chicago Coal & Dock Co. versus Bassett* are the cases we wish to call the Court's attention to after the plaintiff's opposition, and specifically *Chicago Coal & Dock* involved a lighter vessel, it involved a crew member who was on the crew of that vessel pursuant to a Coast Guard inspection certificate. The master of that vessel came into court to testify that he was a necessary member of the crew according to the U.S. Coast Guard, and, nonetheless, because plaintiff facilitated the loading and unloading of coal aboard the larger vessels, he was found to be a longshoreman and, consequently, not entitled to bring the Jones Act action as a matter of law. In fact, there is an extensive cite at page 260 of that opinion in which they set forth exactly the status.

O'Roarke, we have an F.E.L.A. case, F.E.L.A. being incorporated in the Jones Act. And in that case, summary judgment granted by the trial court based upon the railroad worker going on to barges on navigable waters and consequently being covered by the Longshore Act, was overruled by the circuit court finding that this man was a member of the Railroad Union, he was a member -- he was indeed employed by a railroad, and he worked releasing brakes as he did in a shore side capacity, he worked essentially as a brakeman, nonetheless, the supreme court found that because he was facilitating the loading and offloading of railcars on to barges on navigable waters, he was covered by the Longshore Act and, consequently, could not bring his F.E.L.A. claim or his Jones Act claim.

The plaintiff suggests that the Ninth Circuit has ruled that you cannot have summary judgment on seaman status. And to support that proposition, he cites *Wenzel versus Seaward Marine Services*. Now *Wenzel* involves a very strange special purpose vessel. And in fact, the Ninth Circuit in the case immediately after, actually two years later, but the next seaman's case considered by the Ninth Circuit, found no seaman status as a matter of law. That's the case of *Craig versus M/V PEACOCK*, 760 Fed. 2d 953. This was a case in which they found that researchers could not, as a matter of law, be a seaman aboard the vessels that they were aboard. And in fact, that case is somewhat analogous to this case, as is *Buna* and *Baker* and the Ninth Circuit authority holding that people who use a vessel in order to supply some other trade, are not crew members aiding in navigation.

Now the plaintiff also attempts to establish the Ninth Circuit would not approve of the *Pizzitolo/Williams* line of cases in the Fifth Circuit. The *Williams* case being the one that says once the district court has determined that an employee is covered by the Longshore and Harbor Workers' Compensation Act, they need look no further; *Pizzitolo* being a little more detailed opinion which was prior to that.

Now that is entirely incorrect. In addition to the United States Supreme Court cases which I just cited, *O'Roarke* and *Chicago*

Coal upon which the Fifth Circuit relied, we have the case of *Arvidson*, which was decided by the Ninth Circuit in 1972. That case was a case in which the Ninth Circuit assumed, arguendo, that this employee was working aboard a vessel and doing the traditional work of a seaman. Nonetheless, because this employee -- and this is *Arvidson versus Dillingham Construction* -- nonetheless, the Ninth Circuit found that because he was covered by the Longshore and Harbor Workers' Compensation Act, he was barred from bringing the Jones Act. Now this again is prior to the passage of 1972 amendments; I mean, even though this is a '72 case, it dealt with prior to '72 law.

So now since 1972, we have the Congress saying, one, there is no more unseaworthiness cause of action for any maritime employee under the Longshore and Harbor Workers' Compensation Act, regardless of the owner of the vessel. And in 1984, they step in and say not only that, but a negligence cause of action enunciated in 905(b) -- 33 U.S. Code 905(b) of the Longshore and Harbor Workers' Act, does not apply to employees. In other words, there is no dual capacity.

Essentially, your honor, although we shifted our emphasis to this line of cases, to the *Pizzitolo* and the *Williams* line of cases, which go all the way back to *Chicago Coal* and accepted by the Ninth Circuit in '72, we still believe that consistent with *Baker* and *Buna* -- and by the way, *Baker* was approved by the Ninth Circuit in the 1984 opinion called *Samson*, which is cited in our reply memorandum, for the exact proposition that the exclusive remedy provisions, the Longshore and Harbor Workers' Compensation Act bar a claim by a harbor worker against his employer based upon the Jones Act.

Now putting aside that line of cases, we still believe a rigger who works aboard a square platform within the confines of a shipyard simply cannot be found to be a seaman as a matter of law. And that's the exact analysis that the Northern District of California used in the *Baker* and *Buna* case. In the *Baker* case they found that an employee who was assigned to a shore site gang who spent a great deal of time on barges was nonetheless a ship

repairman because he was shorebound; his supervisors were ashore, he went ashore to sleep, and was not permanently assigned to any vessels in navigation. In *Buna* they found a paint float that happens to move around to someone's ship repair facility does not become a vessel by the mere act that it's moving around the other vessels that are being repaired.

And so Southwest Marine submits that both under the *Pizzitolo* and *South Chicago Cole* line of cases, and under the three-prong test, plaintiff is not a seaman as a matter of law and summary judgment is proper.

THE COURT: Thank you, counsel.

Anything to add?

MR. EASLEY: Yes, sir.

First of all, the plaintiff in this case is not just a loader/unloader as the cases that Mr. McMullen referred to dealt with. The facts in this case are really overwhelming. There are some cases where somebody is a fundamentally land-based maritime worker and his connection with vessels, other than those being repaired, is sporadic to say the best.

That's not the situation here with Mr. Gizoni. Mr. Gizoni was a rigger foreman at Southwest Marine. Southwest Marine owns their own barges and their own floating cranes. He worked on those barges every single day. When the barges were moved around the harbor between Southwest Marine and the Navy base and various different locations where the work was being done, he rode the barge, he served as a lookout for the tugboat operator, he helped docking and undocking, the maneuvering of the barge. And really another connection he had with the barges is even beyond working on them and riding on them every day, and that is that Southwest Marine has a department that is called the facilities department that is in charge of all of the barges Southwest Marine; it owns its own tugs, barges, and cranes. And the facilities department is in charge of the barges. Mr. Gizoni

worked on the night shift, and on the night shift there is no facilities department. So on the night shift, the riggers are in charge of all the barges.

So I would say in this case he's connected with the barges three different ways; he works on them, he rides on them, he serves as a lookout, and he maintains them and is responsible for them during his entire shift.

I gave a lot of examples and hypotheticals in my opposition papers. And I want to say that tugs owned by shipyards are not vessels in navigation for Jones Act purposes, but tugs and barges owned by nonshipyards are. I want to say that a tug that is towing a barge down the Mississippi, people on the tug are seaman, the people in the barge aren't. They seem to be some fairly ridiculous distinctions that we have to make in that situation.

I brought a copy of the Longshore Act with me. The Longshore Act doesn't apply to this case. I realize Mr. McMullen cited a line of cases dealing with the Longshore Act. We don't feel we're governed by the Longshore Act. Mr. Gizoni is claiming seaman status in this case.

The very first page in the Longshore Act, which is 33 U.S. Code section 905 -- section 900 and it goes on. Section 2, paragraph 3, says, "the term employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshore operations, and any harbor worker, including a ship repairman, a shipbuilding, and shipbreaker, but such term does not include," and it has a long list of people that are excluded from the Longshore Act. And paragraph G says, "a master or member of a crew of any vessel." Now there is not a second sentence there that says, "unless the vessel is owned by the shipyard."

The shipyard employers seem to be looking for some type of vessel owner exclusion in this act that would eliminate anybody that works for them from claiming seaman status. And, frankly, I don't see such an exclusion in the Longshore Act. And I realize

that that argument has been made that if you work for a shipyard, you shouldn't be able to allege seaman status.

Now, I'll tell you where I see the difference. It's true that when shipyards were building ships in the seventies and eighties, guys would get hurt on the ships under construction and they would immediately claim that they were seamen on the ship being built. The Congress eliminated that type of cause of action. The 905(b) -- vessel under negligence, the 905(b) action Mr. McMullen referred to.

There are also situations where a vessel owner would bring a ship into a shipyard, turn it over to the shipyard, and the shipyard could be considered the owner pro hac vice in a legal sense, and longshoremen -- shipyard workers that were working on the vessel at that time were trying to claim negligence actions against the vessel, some presumably as seaman and some presumably as third-party actions. And that was eliminated.

I cited some remarks made in the Longshore Desk book which is published by the U.S. Department of Labor and which deals a lot with the congressional intent of the Longshore Act and the amendments. And you could see the part that I quoted there. Basically, try to destroy shipyard worker negligence actions against the employers for vessels under repair and vessels under construction. But if we're going to create a legal system where a shipyard can go out and buy its own tug boats and its own barges, and that's going to exclude any claim of seaman status by virtue of the ownership of the vessel, I think we're really missing the point on that.

Now I'd like to respond to a couple of other things.

In the *Wenzel* case, which I believe is the standard of seaman status in the Ninth Circuit, this diver worked with these little underwater scooters to clean vessel hulls and repair vessel hulls. He was arguably engaged in ship repair and enumerated employment under the Longshore Act. And the defendants prevailed on a summary judgment to get the seaman's status thing

thrown out, and the Ninth Circuit reinstated it saying it's a jury issue, it's an issue of fact.

Whether Mr. Gizoni is a harbor worker or whether he's a seaman, that's an issue of fact which is most properly decided by a jury. *Wenzel* upholds Gizoni's right to have that issue tried by a jury, and there is a long line of Supreme Court cases that do. And it's largely the thinking in the maritime legal community that this *Chicago Coal/Bassett* case has been overruled by subsequent Supreme Court cases on the seaman's status issue, and I have listed and explained all those cases in my opposition papers.

The defendant in this case is trying to get you to make a determination today as to whether Mr. Gizoni is covered under the Longshore Act or whether he's covered under the Jones Act. And I think that's an awfully tough ruling to make today, and I'll tell you why.

There was a case that was litigated before the Department of Labor last year called *Ryan versus Alaska Contractors*; these are administrative law judge hearings where people claim benefits under the Longshore Act. Mr. Ryan was a welder who worked on a barge offshore. This is the Outer Continental Shelf Land Act which is nothing more than the extension of the Longshore Act. He was a welder working on a barge up in the Ventura/Santa Barbara area, and he got hurt welding on the barge, and he claimed Longshore Act benefits. The judge ruled that because of his assignment to the barge, he was ineligible for the Longshore Act.

So just having Southwest Marine coming here and saying, "Hey, this gay *{sic}* can't be a seaman, he's eligible for Longshore Act benefits," from my point of view that's certainly presumptuous.

THE COURT: Well, it may be, but I think he's correct.

I think that he is entitled to summary judgment. I think the plaintiff is a harbor worker under the Longshoreman's Act. I do

not think that barge floats are vessels in navigation. Plaintiff is not aboard a vessel, the float -- the barge float for the purpose primarily in aid of navigation. I don't think he's entitled to bring his action of negligence under the Jones Act.

To acquire seaman status, he would have to be -- the vessel must be in navigation, and these are not in navigation. The claimant must be more or less permanently connected to the vessel, and he's not. The claimant must be aboard primarily in aid of navigation, and he's not, he's primarily aboard for the purpose of rigging, and that is not navigation.

I don't think the barge floats are vessels under the Jones Act either. Their structure and purpose is to facilitate the repair of other vessels. They do not have navigational aids, they do not have rigged bows, they do not have life boats or other lifesaving equipment, they do not have billows pumps, they do not have crew headquarters, they do not have registrations of vessels with the coast guard.

And, therefore, in my judgment they are just what they say they are, docks or barges from which there is a platform, from that platform there is a rigger, and the fact that it is -- the platform is afloat, does not make it navigable or in navigation.

So the judgment is for the defendant -- the summary judgment.

And I think there was something mentioned about sanctions. There are no sanctions to be ordered in this case.

That's all.

Prepare the order, please, Mr. McMullen.

MR. McMULLEN: Yes, your Honor, I will.

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No. 90-584

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In The

Supreme Court of the United States

October Term, 1990

SOUTHWEST MARINE, INC.

Petitioner,

v.

BYRON GIZONI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit, reported at 909 F.2d 385 (9th Cir. 1990), reversed and remanded the decision of the United States District Court for the Southern District of California. The District Court had granted the motion of Southwest Marine for summary judgment on the ground that Plaintiff was a ship repairman and not a seaman. Plaintiff's employer, Southwest Marine, Inc., has filed a Petition for Writ of Certiorari, which plaintiff opposes.

JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 24, 1990. Consequently, jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1). This Brief In Opposition For Respondent was timely filed pursuant to 28 U.S.C.§ 2101(c).

STATUTES INVOLVED

The Jones Act, 46 U.S.C. § 688(a):

> (a) Application of Railway Employee Statutes; Jurisdiction.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G):

> (3) The term "employee" means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include –
>
> (G) a master or member of a crew of any vessel; . . .

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a):

> The liability of any employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.

STATEMENT OF THE CASE

Plaintiff Byron Gizoni was a rigging foreman employed by Southwest Marine, Inc. in San Diego, California. He and the riggers under his supervision manned various barges owned by Southwest Marine, which Southwest Marine insists are "floating platforms", not barges (a distinction which is legally irrelevant).

Nonetheless, plaintiff worked substantially aboard these barges which were used to transport ship parts and ship repair equipment around San Diego Harbor. The barges were moved with tugs between the various piers at Southwest Marine, and from the Southwest Marine yard to the Naval Station at 32nd Street. During these moves plaintiff served as a lookout and gave maneuvering signals to the tugboat operator.

On April 6, 1987, one of the Southwest Marine barges was being used to transport a rudder from the shipyard to a floating drydock where it was to be reinstalled on a U.S. Navy ship. While walking on the deck of the barge, plaintiff's foot broke through a thin wooden sheet which was covering a hole in the deck. In the fall plaintiff suffered disabling leg and back injuries and is unable to work. Because plaintiff was permanently assigned to the Southwest Marine barges he alleged seaman status and sued his employer pursuant to the Jones Act.

Defendant challenges plaintiff's right to claim seaman status and states that he is a harbor worker who is limited to Longshore Act benefits.

However, Section 2 (3)(G) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 903, *excludes* "a master or member of a crew of any vessel."

Plaintiff is claiming that he is a member of the crew of the barges. Whether he is in fact a seaman or a harbor worker is a factual issue which must be resolved by a jury.

Defendant Southwest Marine, Inc. brought a motion for summary judgment claiming there were no triable issues of fact, and the motion was granted.

Basically, defendant was able to persuade the District Court to rule on factual disputes which belong in front of a jury such as seaman status and vessel status. Plaintiff's opposition papers contested and controverted these assertions. The District Court misstated the legal definitions of seaman and vessel and chose to ignore the facts and factual disputes.

SUMMARY OF ARGUMENT

It is Plaintiff's position that, pursuant to numerous Supreme Court decisions, seaman status is a factual issue, which must be resolved by a jury. The Supreme Court has broadened the "aid to navigation" requirement to encompass those who contribute to the mission of the vessel, yet defendant wants to narrow it to those who aid the transportation function of the vessel. The Supreme Court has defined vessels as every description of watercraft or other contrivances capable of being used for transportation on water, yet Southwest Marine seeks to exclude work barges in its shipyard.

Southwest Marine wants the district court judges to usurp the jury's power and exclude everyone from Jones

Act coverage who is employed in the ship repair industry, regardless of their roles in the operation of vessels.

ARGUMENT

1. THE DISTRICT COURT AND THE DEFENDANT ARE WRONG IN THEIR CONTENTION THAT DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

In *Harney v. William M. Moore Building Corporation,* 359 F.2d 649 (2nd Cir. 1066) the District Court dismissed plaintiff's complaint which alleged seaman status because he operated a pump on a crane barge. The Second Circuit reversed and remanded for a jury determination of plaintiff's seaman status. These facts are quite similar to the instant case. Contrary to defendant's argument, the Second Circuit also found a crane barge (similar to the barges plaintiff worked on) to be a vessel in navigation for Jones Act purposes in *Salgado v. M.J. Rudolf Corp.*, 514 F.2d 750 (2nd Cir. 1975).

Floating structures that do not move such as floating dry docks and wharf boats fastened to the shore and used to facilitate the transfer of freight between ship and shore are not considered vessels in navigation for Jones Act purposes. *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 30 L.Ed. 501, 7 S. Ct. 336 (1887). On the other hand, where the transportation function of a floating structure is more than just incidental, vessel status is proper. *Brunet v. Boh Bros. Construction Co.*, 715 F.2d 196 (5th Cir. 1983). The

transportation function of the barges that plaintiff worked on was more than just incidental. These barges traveled for miles around San Diego Harbor transporting ship parts and equipment. A barge is a vessel as a matter of law. *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

Even if the barges plaintiff worked on are found to be "floating structures" (which they are not), they are *still* vessels for Jones Act purposes. In a very recent decision, the U.S. Supreme Court stated in *Herb's Welding, Inc. v. Gray*, 1985 AMC 1700, 470 U.S. 414, 105 S. Ct. 1421, 84 L.Ed.2d (1985) that "floating structures" are vessels and workers permanently attached to such vessels as crew members are regarded as *seamen* (note 2).

So, even if one were to find that the barges plaintiff worked on are not really barges, but "floating platforms," they are still vessels in navigation for Jones Act purposes, so the distinction is irrelevant for purposes of this litigation.

In *Brunet v. Boh Brothers*, the Fifth Circuit reversed a summary judgment motion denying seamen status to a worker on a barge which supported a pile driving crane. The barge was designed to both support the crane and transport it on a fairly regular basis from one jobsite to another, even though it remained moored at one site for several months at a time. On p. 198 of the *Brunet* decision the Court said,

> "While we agree that the barge was used more often to support the crane than to transport it, we cannot agree that the transportation function was so "incidental" as to warrant a conclusion that the barge was not a vessel as a matter of law.

> This case is materially different from others in which we have found a craft's transportation function to be incidental to the purpose for which it was designed. This was not a platform built ashore and moved to a permanent worksite. It was instead built with mobility over navigable waters as one of its features."

It is clear from the facts of the instant case that the barges plaintiff was assigned to moved ship parts and supplies all over San Diego harbor, and their transportation function was hardly "incidental."

Strange looking, special purpose craft for the oil and gas business, far different from traditional seafaring ships have sometimes been held to be vessels. *Blanchard v. Engine & Gas Compressor Services Inc.*, 575 F.2d 1140, 1142 (5th Cir. 1978). In *Hicks v. Ocean Drilling and Exploration Company*, 512 F.2d 817 (5th Cir. 1975), cert. denied, 423 U.S. 1050, 96 S. Ct. 777, 46 L.Ed.2d 639 (1976), a submersible oil storage facility and drilling barge was held to be a vessel even though it had no motive power itself and, when used for drilling rested on the ocean floor. The fact that the barge could be towed from one point to another was sufficient navigational ability to satisfy the Jones Act, just like the Southwest barges. Non-merchant vessels, such as the Southwest Marine barges are "in navigation" if they are engaged in their expected duties on navigable waters. *Garret v. Dean Shank Drilling Co., Inc.*, 799 F.2d 1007, 1009 (5th Cir. 1986). There is no question that Southwest Marine barges were engaged in their expected duties on navigable waters during the time plaintiff worked on them.

In another case, a drilling barge was used in an offshore oil drilling operation. Her sea cocks would be opened so that she rested on the bottom while drilling took place. In another case, a drilling barge was used in an offshore oil drilling operation. Her sea cocks would be opened so that she rested on the bottom while drilling took place. Her holds would be pumped out and the barge would then be towed by tug to a new drilling site. The plaintiff was a drilling roustabout whose foot was injured when a pipe fell on it. The District Court held as a matter of law that the drilling barge was a vessel and that the plaintiff was a seaman. The District Court granted the plaintiff's motion for a directed verdict. The drilling barge had a hull, navigation instruments and lights, water compartments, pumps, sea cocks, decking, mooring lines and stanchions. In affirming the Court of Appeals said: "It is well settled that a barge may be a vessel. Here we have a special purpose barge designed to serve as a mobile drilling platform. At the time of the accident, the barge was being used for that purpose. The barge is equipped for use in navigable waters, had traveled a considerable distance through such waters to its present site and was, at the time of the accident, located in a navigable canal . . . There is no evidence that the vessel here was not being used for its designed purpose, etc." *Producers Drilling Co. v. Gray*, 361 F.2d 432 (CA 5th 1968).

There is virtually no difference between the Southwest Marine barges and the vessel mentioned in *Producers Drilling Co.* The Southwest Marine barges have no means of self-propulsion, but such barges are still vessels for Jones Act purposes. The Southwest Marine barges were operated in navigable waters and were used to transport ship parts and ship repair equipment.

In *Norton v. Warner Co.*, 321 U.S. 565, 88 L.Ed. 931 (1944), the Supreme Court defined a vessel for Jones Act purposes as "every description of watercraft or other artificial contrivances used, or capable of being used as a means of transportation on water." Although barges, such as the ones owned by Southwest Marine have no power of their own, they are still capable of being a means of transportation on water.

For purposes of this litigation Southwest Marine has magically reclassified all of its barges as "floating platforms." They are not floating platforms – they are barges which are vessels in navigation for Jones Act purposes. Obviously this is a factual dispute which must be resolved by the trier of fact.

Barges with no motive power of their own such as the ones Plaintiff Gizoni was assigned to are vessels for Jones Act purposes. *Norton v. Warner,* supra, 571.

A vessel is always in navigation unless it is under construction, laid up on land, mothballed, or on seatrials. *Reynolds v. Ingalls Shipbuilding Division,* 788 F.2d 264 (5th Cir. 1986). The Southwest Marine barges are certainly vessels in navigation when one considers the holdings in *M/V Marifax v. McCrory,* 391 F.2d 909 (CA 5 Fla 1968); *Boatel, Inc. v. Delamore,* 379 F.2d 850 (CA 5 La 1967); *Gianfala v. Texas,* 76 S. Ct. 141 (1955); and *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958). The barge was performing its mission on navigable waters when plaintiff worked on it.

2. DETERMINATION OF VESSEL STATUS IN A JONES ACT CASE IS A JURY ISSUE

As with other criteria for establishing seaman status, the determination as to whether a vessel is in navigation is, except in rare instances, a question of fact. *Roper v. United States,* 368 U.S. 20, 23 (1961), *Butler v. Whiteman,* 356 U.S. 271, 1959 AMC 2566 (1958); *Fredieu v. Rowan Companies, Inc.*, 738 F.2d 651 (5 Cir. 1984); *Waganer v. Sea-Land Service, Inc.*, 1973 AMC 2627, 486 F.2d 955 (5 Cir. 1973). It has been clearly established that "the 'in navigation' requirement is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on navigable waters." *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3rd Cir. 1975). Thus, an injured seaman may recover for injuries suffered while on the wharf, or while performing shore based repairs, so long as the vessel is upon navigable waters. *The Tungus v. Skovgaard,* 358 U.S. 588, 1959 AMC 813 (1959); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 1957 AMC 891 (1957). A vessel may still be considered to be "in navigation" although moored to a pier, or in a repair yard or drydock undergoing repairs. *Wixom v. Boland Marine and Manufacturing Co., Inc.*, 614 F.2d 956, 1980 AMC 2993 [DRO] (5 Cir. 1980); *Warner v. Fish Meal Company,* 548 F.2d 1193 (5 Cir. 1977); *Waganer v. Sea-Land Service, Inc.*, 1973 AMC 2627, 486 F.2d 955 (5 Cir. 1973).

3. THE DISTRICT COURT HAS INCORRECTLY DEFINED AND APPLIED THE "AID TO NAVIGATION" TEST FOR SEAMAN STATUS

On page 12 of the summary judgment hearing transcript, the District Court judge stated that to be a seaman one must be aboard "primarily in aid of navigation" and that rigging was "not navigation." The District Court is off the mark both in the law and the facts.

First of all, one must consider the U.S. Supreme Court's broad definition of the term "aid to navigation."

The most significant Supreme Court holding which expands the "aid to navigation" test is *Norton v. Warner Company*, 321 U.S. 565 (1944), which stated:

> "Navigation is not limited to putting over the helm; it also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can 'hand, reef, and steer.' "

In *Norton* the Supreme Court held that a bargeman who lived aboard a vessel and handled mooring lines and navigation lights was a seaman. The Court further stated that seaman status applied to those who "contribute to and labor about the operation and welfare" of the vessel. This description certainly fits Mr. Gizoni who handled lines and crane hooks in furtherance of the mission of the SOUTHWEST MARINE barges.

The Supreme Court further expanded the "aid in navigation" concept in *Senko v. LaCrosse Dredging Corp.*, 77 S. Ct. 415 (1957) when it upheld seaman status for a *handyman* on a dredge which was anchored and *never* moved during the time of plaintiff's employment.

In a case which touches on all aspects of the seaman issue, *Lunsford v. Fireman's Fund Insurance Co.*, 635 F. Supp. 72 (Ed. La 1986), the Court upheld seaman status for a woman who cleaned a pleasure boat three days a week. The cleaning contributed to the mission and function of the vessel and she was permanently attached to the boat because she did not work on any other vessels.

Since "navigation" means mission or operation of a vessel, it is clear that plaintiff satisfies this aid to navigation requirement for seaman status because he helps to rig on barges that are often used for the purpose of rigging, but he also handles lines, serves as a lookout for the tug operator, ensures the security of the equipment being transported, directs the tug operator from the barge, and participates in the transportation of ship parts around San Diego Harbor. The District Court seems to be confusing the word "navigation" with the word "transportation," but even if one accepts this error in terms, plaintiff Gizoni *did* contribute to the transportation function of the barges, so this issue raises substantial factual as well as legal disputes.

Southwest Marine seems to be relying on *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), which basically narrowed the "aid to navigation" test so that one can only be a seaman if he contributes to the "transportation" function of the vessel. This narrowed test is an aberration which is not followed in any other circuit and is inconsistent with the Supreme Court's holding in *Norton v. Warner*, supra. Cooks (*Buna v. Global Marine, Inc.*, 428 F.2d 40, 5th Cir. 1970); and bartenders (*J.S. Warden*, 175 F. 314, S.D.N.Y. 1910); have been found to be seamen. A seaman is one who contributes to the

mission of the vessel, not necessarily the movement of a vessel.

4. WHETHER PLAINTIFF WAS PERMANENTLY ATTACHED TO A VESSEL OR GROUP OF VESSELS IS A DISPUTED FACTUAL ISSUE WHICH SHOULD GO TO A JURY

On Page 12 of the summary judgment hearing transcript, lines 2 and 3, the District Court judge stated that plaintiff was not permanently connected to a vessel. This finding is untrue, and if there is a dispute on this issue, then it is a *factual* dispute which should be resolved by a jury.

In the declaration that plaintiff Gizoni filed with his opposition to the summary judgment motion he stated:

> "I had worked at Southwest Marine for 3½ years as a rigger and rigging foreman. I worked on the crane barge or the work barges every single day. The third shift riggers, of which I was one, regularly worked on the barges and were responsible for the cleanliness of the barges on a daily basis. I was permanently assigned to the Southwest Marine barges and I worked substantially aboard them. I regularly rode the barges while they were underway within the Southwest Marine yard and also when the barges were towed from Southwest Marine to the Naval Station at 32nd Street. During these moves I handled lines and served as a lookout for the tugboat operator and I gave hand signals to the tugboat operator."

This declaration obviously shows a permanent attachment to the barges. To be a seaman, one need not be attached to one vessel, but to a group of vessels under

common ownership and control. This "fleet doctrine" was first discussed in *Norton v. Warner*, 321 U.S. 565, 572 (1944), and further expanded by *Ardoin v. J. Ray McDermont & Co.*, 641 F.2d 277 (5th Cir. 1981); *Robert v. Williams-McWilliams Co.*, 648 F.2d 255, 261-2 (5th Cir. 1981); and *Waguespark v. Aetna Life & Casualty Co.*, 795 F.2d 523 (5th Cir. 1986). Since plaintiff Gizoni was permanently assigned to defendant's barge fleet, he is a seaman.

In *Bullis v. Twentieth Century-Fox Film Corporation*, 474 F.2d 392 (9th Cir. 1973), the Ninth Circuit said on p. 394:

> "The second requirement for seaman status is that there be a more or less permanent connection with the vessel. Significantly the connection may be less permanent, but it cannot be temporary or transitory."

In the instant case, plaintiff's connection to the Southwest Marine barges was hardly temporary or transitory. Working on the barges was a daily part of his job. The Ninth Circuit test in *Bullis* was echoed by the Ninth Circuit in *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (1983). Plaintiff Gizoni worked aboard the Southwest Marine barges everyday. Certainly this is more than a *temporary* or *transitory* connection.

5. SOUTHWEST MARINE'S CONTENTION THAT PLAINTIFF IS PRECLUDED FROM BRINGING THIS ACTION BECAUSE OF THE LONGSHORE ACT IS A MISSTATEMENT OF THE LAW

It is Southwest Marine's position that plaintiff, as a harbor worker, is precluded from bringing this action against his employer by the exclusive remedy provisions

of the Longshore Act. This dispute is the crux of the whole case. It is plaintiff's contention that he would only be bound by the exclusive remedy provision of the Longshore Act if he were found to be a harbor worker by the trier of fact – and this is something which has never occurred.

Sec. 2 (3) (G) of the Longshore Act [33 U.S.C. 092 (2) (G)] excludes from coverage "a master or member of crew of any vessel." Therefore, if a jury found Gizoni to be a seaman, he would be ineligible for Longshore Act benefits.

The District Court stated in its decision that plaintiff was not aboard vessels to aid in navigation but rather to "perform work as a ship repairman." This statement is very misleading. Plaintiff never repaired his employer's barges – he worked on them to transport parts and do rigging operations that were essential to the loading and unloading of parts that had to be transported. He used the barges to repair *other* vessels, just as Mr. Wenzel used the scamp to repair Navy ships in *Estate of Wenzel v. Seaward Marine Services, Inc.*, 708 F.2d 1326 (9th Cir., 1983), wherein the Court ruled that Wenzel's seaman status was a jury issue. The District Court's finding in Gizoni is inconsistent with *Wenzel*.

6. ACCORDING TO THE SUPREME COURT, SEAMAN STATUS IS AN ISSUE FOR THE JURY, THEREFORE IT IS NOT A PROPER SUBJECT FOR A SUMMARY JUDGMENT MOTION

Gianfala v. Texas Company, 350 U.S. 879 (1955); *Senko v. Lacrosse Dredging Corporation*, 352 U.S. 370 (1957); *Grimes*

v. Raymond Concrete Pile Company, 356 U.S. 252 (1958); *Butler v. Whiteman*, 356 U.S. 271 (1958).

The Supreme Court has consistently held that seaman status is a jury issue.

Courts have upheld summary judgments and directed verdicts denying seaman status where plaintiffs worked on fixed oil drilling platforms but slept on a tender vessel that serviced the rig, *Golden v. Rowan Companies, Inc.*, 778 F.2d 1022 (5th Cir. 1985); and where an anchor handler was hurt on land before any assignment to a vessel, *Ramos v. Delmar Systems, Inc.*, 750 F.2d 389 (5th Cir. 1985); and where a plaintiff performed longshoremen's work by loading chemicals onto vessels serviced by his employer, *Balfer v. Mayonne Mud and Chemical Co.*, 762 F.2d 432 (5th Cir. 1985). In these cases the plaintiffs were working on land and had no relationship to a vessel. They are not analogous to the facts in the instant case.

A significant Supreme Court case was *Gianfala v. Texas Company*, 350 U.S. 879 (1955), involving a death action of a worker who had been assigned to a submersible drilling barge and who had been killed while helping unload pipes from an adjacent cargo barge. A jury found the worker to be a crew member. The Fifth Circuit reversed, holding that the status issue was a question of law to be resolved by the judge, that the drilling barge was not in navigation, and that the decedent was on board as a member of a drilling crew and not as a member of a ship's crew. The Supreme Court, without explanation, reversed and remanded the case to the district court with instructions to reinstate the judgment.

The next Supreme Court decision on the issue was *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957). The Supreme Court reinstated a state court finding of a seaman status for a handyman on a dredge that had been anchored ashore and used as a stationary earth-moving machine. Senko was a laborer on the dredge who worked an eight-hour shift, ran errands on shore, was paid by the hour, lived at home, drove back and forth each day, and brought his own meals to work. He had no duties connected with moving the dredge and was injured ashore while placing a signal lantern from the dredge in a shack on land. The Court held that "the determination of whether an injured person was a 'member of the crew' is to be left to the finder of fact." *Id.* at 374. Of significance to the Court was testimony regarding Senko's duty "to maintain the dredge during its anchorage and for its future trips." The Court also found it significant that the plaintiff performed almost all his duties on or on behalf of the dredge and therefore considered him to be "permanently attached to and employed by the dredge as a member of its crew." *Id.* at 372. The Court held this was sufficient evidence to support a jury finding of a crew-member status.

After these decisions, the Supreme Court considered only two other cases involving the status issue. *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) involved a pile driver who had helped in completing a "Texas tower," a radar relay installation like a fixed drilling platform. Grimes had lived on the tower and kept its equipment in operating condition while it was being towed out to sea. He had performed strictly piledriving duties after the tower reached its location and was

anchored. Several days later, he was injured while returning from a trip from a nearby barge to the tower. The Court of Appeals held that Grimes was not a crew member as a matter of law. The Supreme Court, however, reversed without explanation, citing *Senko*, and *Gianfala*, in holding that there was sufficient evidence to send the status issue to the jury.

The second case, *Butler v. Whiteman*, 356 U.S. 271 (1958), involved a day laborer who had performed odd jobs around his employer's wharf and was killed when he fell off either a barge moored to a wharf or an inoperable tug tied to a barge. The trial court granted the employer's motion for a directed verdict, and the circuit court affirmed, noting that evidence indicated that the tug was not in navigation and the deceased was not a seaman. The Supreme Court, as in *Grimes*, reversed without explanation and remanded. holding that the status issue was a question for the jury.

The Ninth Circuit has followed the Supreme Court in making seaman status a jury issue in a very significant case known as *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983). Wenzel was a diver employed by Seaward Marine Services. From 1979 to 1982 Seaward had a contract with the U.S. Navy to clean ship hulls. The cleaning process was accomplished by divers going underwater with handheld scrapers and brushes and a submerged cleaning and maintenance platform known as a SCAMP. The SCAMP was a saucer shaped unit 6 feet in diameter and 20 inches deep. It traveled along the ship's hull underwater at 54 feet per minute and could be operated manually by divers. Wenzel, a diver/tender,

was assigned to scrape the USS RATHBURNE's underwater sea chest on October 3, 1980, while the SCAMP was *out* of the water. When Wenzel did not surface another diver went underwater and found his body affixed to a sea chest. He had died of asphyxiation. His estate filed a Jones Act claim against Seaward alleging seaman status. Seaward filed a motion for summary judgment arguing that Wenzel was a harbor worker, not a seaman, and the district court granted the motion for summary judgment. The district court's ruling was reversed by the Ninth Circuit, which said that Wenzel's status as a seaman was a close question of fact which had to be determined by the trier of fact.

7. ONLY IN THE *RAREST* FACTUAL SITUATION CAN THE QUESTION OF SEAMAN STATUS BE RESOLVED AS A MATTER OF LAW

Since an individual's status as a seaman depends largely on the totality of circumstances unique to each particular case, only in the rarest factual situation can the question be resolved as a matter of law. *Bodden v. Coordinated Caribbean Transport, Inc.*, 1967 AMC 2731, 2733, 369 F.2d 273, 275 (5th Cir. 1966); see *Barrett v. Chevron, U.S.A., Inc.*, 1986 AMC 2455, 2463, 781 F.2d 1067, 1072 (5 Cir. 1986). It has been recognized that even where the facts are largely undisputed, a question as to an individual's status as a seaman for purposes of the Jones Act is nevertheless "not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts." Id. 1986 AMC at 2463-64, 681 F.2d at 1072-73 (quoting *Offshore Company v. Robison*, 1959 AMC 2049, 2064-65, 266 F.2d 769, 780 (5 Cir. 1959); see *Griffith v. Wheeling Pittsburgh Steel Corp.*, 1975 AMC 2527, 2531, 521 F.2d 31, 36 (3 Cir. 1975); *Gahagan Const. Corp. v. Armao*, 1948 AMC 677, 683, 165 F.2d 301, 305 (1 Cir. 1948).

CONCLUSION

According to the United States Supreme Court the parts of the 1972 amendments to the Longshore Act adding the status requirement were intended only to expand shoreside coverage. Coverage on the water side of the shoreline was unchanged by those amendments. *Director, OWP, USDL v. Perini North River Assoc.*, 459 U.S. 297, 103 S. Ct. 634, 74 L.Ed.2d 465 (1983). Thus, there has been no change in the "status" requirements of the Longshore Act nor the Jones Act and thus no need to "clarify" the boundary as suggested by Southwest Marine.

The transportation function test proposed by Southwest Marine, if literally applied, would exclude many who now unquestionably qualify as seamen; for example, cooks on tugs, doctors, bartenders, etc., on oceangoing passenger ships. *See Mahramas v. American Export Line*, 475 F.2d 165 (2d Cir. 1973). This "transportation function" test is inconsistent with the Supreme Court's holdings in *Gianfala*, supra, and *Grimes*, supra.

Moreover, the term "vessel" as defined in the United States Code, 1 U.S.C. § 3, "includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Thus it is patently illogical to require that to achieve

seaman status a claimant must perform transportation tasks while the craft to which he is assigned need not be used for that purpose.

Southwest Marine seems to be basing its entire argument on *South Chicago Coal & Dock Co. v. Bassett*, 60 S. Ct. 544 (1940) in which Longshore Act benefits were upheld for a worker assigned to a coal barge. His work consisted mainly of unloading the coal. The Court used a restrictive view of the term "aid to navigation." But this all changed with *Norton v. Warner Co.*, supra, when the Supreme Court upheld seaman status for a handyman on a barge after discussing *South Chicago Coal & Dock Co.*, supra. *Norton* reviewed *South Chicago Coal* and expanded its narrow definition of "aid to navigation" beyond "putting over the helm" to "duties essential for other purposes of the vessel." *South Chicago Coal* is no longer valid law. It was rendered obsolete by *Norton*, and the *Pizzitolo* case is inconsistent with Supreme Court rulings on seaman status.

Southwest Marine envisions a scenario where crewmen on tugs and barges would lose their identity as seaman and lose their Jones Act rights if the tugs and barges are owned by a shipyard. This view is unrealistic and unsupported by the law. For these reasons, Southwest Marine's petition for certiorari should be denied.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

THE IMPORTANCE OF THIS CASE IS NOT IN DISPUTE

In his Brief in Opposition to Petition for Writ of Certiorari, Respondent only makes substantive arguments as to why the decision of the Ninth Circuit is correct.[1] He fails to address any of Petitioner's arguments with respect to the importance of the issues presented in the petition.

Presumably, that is because *there is no argument* with respect to the importance of the issues presented by Southwest Marine's petition or with respect to the uncertainty of the law in that area, including the divergence between the circuits and even between panels of the same circuit. Furthermore, it is notable that Respondent makes no attempt to deny that the Ninth Circuit's

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[1]Petitioner does not concede the merits of Respondent's substantive arguments. However, they will be addressed in Petitioner's brief on the merits, should the Court grant certiorari.

decision in this matter will have a devastating effect on the shipbuilding and repair industry, its employees, and the courts.

THE DECISION OF THE NINTH CIRCUIT AND THE SUBSTANTIVE ARGUMENTS PRESENTED BY RESPONDENT FLY IN THE FACE OF CONGRESSIONAL INTENT

The decision of the Ninth Circuit and Respondent's arguments in opposition to Southwest Marine's Petition for Writ of Certiorari are inconsistent with the intent of Congress in enacting both the LHWCA and the Jones Act. The legislative history behind the Jones Act suggests that Congress intended that Jones Act remedies be limited to those workers whose jobs entail the particular hardships experienced by those who work at sea.[2]

One of the prime purposes of the LHWCA is to provide a prompt and expeditious remedy for work-related injuries to those maritime workers thought by Congress to work in an area in which neither the Jones Act or state workers' compensation acts provide coverage.[3] Congress' intent was *not* that employees be covered under both the Jones Act and the LHWCA.[4]

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[2]*See*, H.R. Rep. No. 639, 67th Cong., 2d Sess. 9 (1922); S. Rep. No. 94, 67th Cong., 1st Sess. 1 (1921); 62 Cong. Rec. 7754 (1922). In fact, as discussed in depth in Southwest Marine's petition, Congress' intent behind the 1972 Amendments to the Longshore Act, which abolished civil actions for unseaworthiness, was that land-based maritime workers be treated the same as other land-based workers. *See*, Petition for Writ of Certiorari, p. 8.

[3]*Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

[4]*See, e.g., South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940); *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048, 1050 (5th Cir. 1988); *Pizzitola v. Electric Coal Transfer Corporation*, 812 F.2d 977, 983 (5th Cir. 1987), *cert. denied*, (continued...)

However, the decision of the Ninth Circuit encourages employees to pursue claims under the LHWCA and the Jones Act. That not only encourages litigation, it also encourages employers to controvert Longshore compensation to their employees in order to avoid providing double payments or recovery. The net effect is that land-based employees would lose their Longshore compensation benefits (when they need it most) and would be pushed toward a negligence-based system in which they must prove liability (the Jones Act). That is also contrary to the intent of Congress that the greatest number of employees have access to a system which provides prompt and voluntary compensation and medical treatment to employees for work-related injuries.

The decision of the Ninth Circuit and the uncertain state of the law have also, in effect, created a new remedial system not contemplated by Congress. That system is for land-based workers who fall through the crack left open by the decision of the Ninth Circuit and the uncertain state of the law in that area. Those workers would obtain generous LHWCA payments as a result of a work-related injury and continue to receive those benefits while litigating their Jones Act claims. Those workers thus enjoy both the security of a no-fault compensation system as well as seamen's remedies not available to their fellow land-based workers.[5]

RESPONDENT'S CONTENTION THAT IF GIZONI WAS FOUND TO BE A "SEAMAN" HE WOULD BE INELIGIBLE FOR LONGSHORE ACT BENEFITS IS DISINGENUOUS

Respondent argues that pursuit of his Jones Act claim does not violate the exclusive remedy provisions of the LHWCA because he

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[4](...continued)
484 U.S. 1059 (1988); *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84, 89 (N.D. Cal. 1978).

[5]Bull, *Seaman Status Applied: A Practical Guide to Status Determination*, 1 U.S.F. Maritime Law Journal 43, 115 (1989).

has not been found to be a harbor worker by a trier-of-fact. However, that argument is disingenuous at best.

The gravamen of Southwest Marine's Petition is that the test for determining seaman's status is uncertain and places a tremendous strain on the shipbuilding and ship repair industries, as well as the judicial system.[6] Respondent begs the question when he asserts that is not a problem because at some point status will be determined.[7] Due to the uncertain state of the law, judicial and other resources are wasted before that determination is made.[8]

Moreover, Respondent's argument ignores the fact that the test for seaman status under the Jones Act can be and is different from the test for determining a member of crew of a vessel under the LHWCA.[9] Since the tests used in different forums are different, an employee can be covered by either the Jones Act or the LHWCA, or both Acts.

Furthermore, the federal circuits apply different tests for determining seaman status.[10] Different panels of the same circuit

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[6]*See*, Petition for Writ of Certiorari, pp. 10, 11.

[7]Respondent apparently is not concerned about the additional strain which addressing those claims would place on the judicial system.

[8]This case is a perfect illustration. Gizoni *filed for and received* LHWCA benefits. Thereafter, he pursued his Jones Act claim by suit in District Court.

[9]*See*, Petition for Writ of Certiorari, p. 18.

[10]As noted in Petitioner's Petition, the First, Fifth and Eighth Circuits apply a *version* of the "special purpose test". However, the Second, Third, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits follow a *version* of the "aid in navigation test." *See*, Petition for Writ of Certiorari, pp. 17-19.

may even apply different tests for seaman status.[11] In California, the federal courts and the state courts also apply different tests.[12] There simply is not a uniform standard and, therefore, the employee's status is never clear.

Significantly, under the Federal Employers' Liability Act,[13] a negligence based system for railway employees similar to the Jones Act, the test for status is clear and is the same test endorsed by Southwest Marine. The FELA is applicable to railway laborers' duties in both intrastate and interstate commerce, if significantly related to the latter.[14]

The FELA overlaps with the LHWCA at the point where the tracks meet the shore, similar to the Jones Act's intersection with the LHWCA where the ship meets the shore. The test for FELA coverage is that if an injury is covered under the LHWCA, the LHWCA is the railway employee's *exclusive* remedy and any action under FELA is barred.[15] Thus, the Supreme Court has clearly rejected any concurrent jurisdiction between the FELA and LHWCA. Rather, there is an "occupational test" -- if covered by the LHWCA, there is no FELA remedy -- that is consistent with

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[11]*Compare*, *Pizzitola*, *supra*, 812 F.2d at 977 with *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

[12]*See*, *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983); *Baker*, *supra*, 451 F.Supp. at 87; *Soucie v. Tratwein Brothers*, 275 Cal. App. 2d 20, 25 (1969).

[13]Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*

[14]*Copley v. I.A.C.*, 19 Cal. 2d 287, 288 (1942), *cert. denied*, 316 U.S. 678 (1942).

[15]*Chesapeake & Ohio Railway Company v. Schwab*, ___ U.S. ___, 110 S.Ct. 381 (1987); *Kelly v. Pittsburgh & Connecticut Dock Co.*, 900 F.2d 89, 93 (6th Cir. 1980).

Pizzitola v. Electric Coal Transfer Corporation[16] and recent rulings of the Court.[17]

Despite Respondent's assertion, the same clarity is not to be found in the interrelation between the Jones Act and LHWCA. Because of the similarity between the FELA and the Jones Act,[18] the same type of occupational test used for FELA claims should be applied to Jones Act claims. If an employee is in an occupation covered by the LHWCA, he is not allowed to proceed with a FELA claim. He should also not be allowed to proceed with a Jones Act claim. Any other resolution encourages litigation, depletion of judicial resources, and continued uncertainty and disagreement among the circuits.

CONCLUSION

Respondent contends that Petitioner seeks a scenario in which seamen would lose their Jones Act rights. That is incorrect. Petitioner suggests that the distinction between seamen and longshore employees should be clear and unambiguous. It is for that reason that Petitioner asks the Court to enunciate a standard under which the maritime industry, maritime employees and the courts can determine whether a particular worker is a maritime

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[16]*Pizzitola, supra*, 812 F.2d at 977.

[17]*Chesapeake & Ohio Railing Co. v. Schwab*, ___ U.S. ___, 110 S. Ct. 381 (1989); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); *Pennsylvania Railroad Company v. O'Roarke*, 344 U.S. 334 (1953).

[18]Indeed, the Jones Act simply extends to seamen the remedies made available to railroad workers under FELA. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960).

employee subject to the provisions of the LHWCA *or* a seaman subject to the provisions of the Jones Act.

Petitioner requests that the Court grant certiorari.

Respectfully submitted,

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FASTIFF & TICHY
A Professional Corporation
ROY D. AXELROD, ESQ.
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Attorneys for
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Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

(5)

No. 90-584

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
VS.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 9, 1990
CERTIORARI GRANTED FEBRUARY 25, 1991

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 30, 1987 — Gizoni complaint and summons filed in U.S. District Court for the Southern District of California.

Feb. 4, 1988 — Southwest Marine, Inc. ("Southwest Marine") answer to complaint for damages and demand for jury trial filed.

June 7, 1988 — Southwest Marine notice of motion and motion for summary judgment filed.

June 17, 1988 — Gizoni memorandum of points and authorities in opposition to motion for summary judgment filed.

June 27, 1988 — Southwest Marine reply to Gizoni's opposition to motion for summary judgment filed.

Sept. 15, 1988 — Order for entry of summary judgment issued.

Sept. 29, 1988 — Gizoni notice of appeal filed with Ninth Circuit.

Feb. 28, 1989 — Gizoni opening brief filed.

Mar. 15, 1989 — Gizoni motion to supplement the record filed.

Mar. 16, 1989 — Gizoni notice of related cases (Rule 28.2.6) filed.

May 22, 1989 — Southwest Marine motion for leave to file brief of an *amicus curiae* filed.

May 22, 1989 — Brief of *amicus curiae* filed.

May 22, 1989 — Southwest Marine supplemental excerpts of record filed.

May 22, 1989 — Brief of Southwest Marine filed.

July 5, 1989 — Gizoni reply brief filed.

July 7, 1989 — Motion to file brief of Shipbuilders Council of America is granted.

Sept. 17, 1990 — Mandate issued.

The Jones Act, 46 U.S.C. § 688(a):

(a) Application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3):

> The term "employee" means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include —
>
> • • •
>
> (G) a master or member of a crew of any vessel;
>
> • • •

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a):

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a):

> The liability of an employer prescribed in section 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b):

> The event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsecton shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Case Number 87-1424GT(CM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BYRON GIZONI,
Plaintiff,
v.
SOUTHWEST MARINE, INC.,
Defendant.

To:
SOUTHWEST MARINE, INC.

SUMMONS IN A CIVIL ACTION

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PRESTON EASLEY, ESQ.
150 West Seventh Street, Suite 203
San Pedro, California 90731

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service, if you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

October 6, 1987

WILLIAM W. LUDDY,
Clerk

C. LeBaron,
Deputy Clerk

PRESTON EASLEY
Attorney at Law

150 West Seventh Street, Suite 203
San Pedro, California 90731
(213) 832-5315

ATTORNEY FOR: Plaintiff
BYRON GIZONI

CASE NO.: 871424 GT(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BYRON GIZONI,
Plaintiff,
v.
SOUTHWEST MARINE, INC.
Defendant.

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

COMES NOW PLAINTIFF BYRON GIZONI and complains of defendant and alleges:

FIRST CAUSE OF ACTION FOR NEGLIGENCE

1. Federal jurisdiction is asserted in this matter pursuant to the Jones Act, 46 U.S.C. Sec. 688.

2. At all times mentioned herein defendant SOUTHWEST MARINE, INC., hereinafter referred to as "SOUTHWEST MARINE" was and now is a corporation duly organized and existing under and by the virtue of the laws of the state of California and is now and has been at all times mentioned herein doing business in the State

of California, with its principal place of business in San Diego, California.

3. During all times herein mentioned defendant SOUTHWEST MARINE owned, operated, managed, possessed and controlled a group of vessels including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge in navigable waters.

4. Said group of vessels were and are used to transport, maintain, and store ship repair equipment and parts in order to aid defendant in performing ship repair activities on various vessels in San Diego Harbor.

5. At all times mentioned herein plaintiff was a rigging foreman and was permanently assigned to said group of vessels and was therefore a Jones Act seaman pursuant to 46 U.S.C. Sec. 688.

6. On or about April 6, 1987, plaintiff was working aboard one of defendant's pontoon barges at approximately 3:30 A.M. on a rigging job involving the rudder of the USS WABASH, a U.S. Navy vessel which was undergoing repairs at defendant's shipyard at the foot of Sampson Street, San Diego, California. Said pontoon barge was in navigable waters.

7. While working on said pontoon barge on or about 3:30 A.M., April 6, 1987, plaintiff sustained serious injuries to his legs, back, and left wrist when a ⅛ inch thick piece of loose scrap wood covering a hole in the deck gave way and plaintiff fell through the hole into the water below.

8. Defendant negligently failed to provide adequate coverings over the hole in the deck of said pontoon barge.

9. As a proximate result of defendant's negligence plaintiff was hurt and injured in his health, strength, and

activity, sustaining injury to his nervous system and person, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. Plaintiff is informed and believes and thereon alleges that such injuries will result in permanent disability to him. Plaintiff is unable to return to his prior employment as a rigging foreman.

10. As a further proximate result of defendant's negligence, plaintiff has incurred and will continue to incur, medical and related expenses. The full amount is not known at this time, and plaintiff will move to amend this complaint to state such amount when the same becomes known to him, on proof thereof.

11. As a further proximate result of defendant's negligence, plaintiff's earning capacity has been greatly impaired, both in the past and present. The exact amount is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state such amount when the same becomes known to him on proof thereof.

SECOND CAUSE OF ACTION FOR UNSEAWORTHINESS

12. Plaintiff incorporates by reference as though fully set forth below each and every allegation of Paragraphs 1 through 11 of the First Cause of Action herein.

13. On or about April 6, 1987, while said pontoon barge was on navigable waters at the foot of Sampson Street, San Diego, California, plaintiff was working aboard said barge as a rigging foreman. Defendant failed to provide plaintiff with a seaworthy vessel in that a hole in the deck of said barge was covered by a piece of scrap wood which gave way when plaintiff stepped on it. As a result of the unseaworthiness of defendant's vessel plaintiff suffered the serious bodily injuries alleged above.

THIRD CAUSE OF ACTION FOR MAINTENANCE AND CURE

14. Plaintiff incorporates by reference as though fully set forth below, each and every allegation of paragraphs 1 through 13 of the First and Second Causes of Action herein.

15. On or about April 6, 1987 plaintiff suffered a disabling condition when a piece of scrap wood covering a hole on defendant's barge gave way and plaintiff fell through the hole.

16. Immediately prior to suffering this condition, plaintiff was a strong, able-bodied person, capable of continous gainful employment in the occupation of rigging foreman. By reason of this disabling condition, plaintiff has been caused to suffer great physical and mental pain and suffering, has incurred and will continue to incur medical and related expenses, and is unable and will continue to be unable to attend his usual occupation as a rigging foreman.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

2. For damages for medical and related expenses according to proof;

3. For damages for lost earnings, both past and future, according to proof;

4. For an amount representing plaintiff's maintenance and cure, according to proof;

5. For costs of suit herein incurred; and

6. For such other and further relief as the Court may deem proper.

DATED: September 28, 1987

PRESTON EASLEY
Attorney at Law

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury in this action.

DATED: September 28, 1987

PRESTON EASLEY
Attorney at Law

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Case No.: 871424 GT (CM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BYRON GIZONI,
Plaintiff
v.
SOUTHWEST MARINE, INC.,
Defendant.

ANSWER TO COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

COMES NOW, Defendant, SOUTHWEST MARINE, INC. ("Southwest Marine"), a corporation, in answer to Plaintiff's Complaint filed herein, admits, denies and alleges as follows:

FIRST CAUSE OF ACTION

1. Southwest Marine denies each and every allegation of Paragraph No. 1, and specifically denies that this Court has subject matter jurisdiction over this claim pursuant to the Jones Act, 46 U.S.C. § 688, or otherwise.

2. Southwest Marine admits it is a duly organized corporation doing business within the State of California.

3. Southwest Marine admits that, on occasion, vessels positioning floating platforms are used to aide in ship repair activities performed at its yard in San Diego. Southwest Marine denies each and every allegation of Paragraph Nos. 3 and 4.

4. Southwest Marine admits that Plaintiff was employed at Southwest Marine as a rigging foreman. Southwest Marine denies each and every other allegation of Paragraph No. 5, and specifically denies that Plaintiff was permanently assigned to any group of vessels.

5. Southwest Marine admits that Plaintiff was transiting a pontoon barge at the time he alleges he was injured. Southwest Marine also admits that repairs were being performed on the rudder of the U.S.S. Wabash. Southwest Marine denies each and every other allegation of Paragraph No. 6.

6. Southwest Marine denies each and every allegation of Paragraph No. 7 and specifically denies that Claimant sustained any injury.

7. Southwest Marine specifically denies each and every allegation of Paragraph Nos. 8, 9, 10 and 11, and specifically denies that Plaintiff was injured or damaged in any sum or sums at all.

SECOND CAUSE OF ACTION

8. Southwest Marine incorporates by reference its answers to Plaintiff's allegations contained in the First Cause of Action to the Complaint herein, which Plaintiff deems relevant and realleges in Paragraph No. 12 of the Complaint.

9. Southwest Marine denies each and every allegation of Paragraph No. 13.

THIRD CAUSE OF ACTION

10. Southwest Marine incorporates by reference its answers to Plaintiff's allegations contained in the First and Second Causes of Action to the Complaint herein, which Plaintiff deems relevant and realleges in Paragraph No. 14 of the Complaint.

11. Southwest Marine denies each and every allegation of Paragraph No. 15.

12. Southwest Marine denies each and every allegation of Paragraph No. 16, and specifically denies that Plaintiff has sustained any injury or damage at all.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint, and each cause of action thereof, fails to state facts sufficient to constitute a cause of action as against this Defendant; furthermore, this Defendant alleges that Plaintiff cannot prove such facts even if properly alleged in the Complaint.

SECOND AFFIRMATIVE DEFENSE

If any injuries were sustained by Plaintiff at or about the time alleged in the Complaint, which is expressly denied, they were caused solely and proximately by the carelessness and negligence of Plaintiff, in that Plaintiff then failed to exercise reasonable care for his own health and safety and failed to use the care, skill and experience of a reasonably competent seaman.

THIRD AFFIRMATIVE DEFENSE

Any and all acts, happenings and/or damages, if any, referred to in Plaintiff's Complaint, were proximately caused by and contributed to by the negligence of Plaintiff and, therefore, Plaintiff is completely barred from recovery herein, or in the alternative, under the doctrine of Comparative Negligence, the negligence of Plaintiff reduces his right to recovery herein by that amount which said negligence contributed to the incident as alleged.

FOURTH AFFIRMATIVE DEFENSE

If any injuries were sustained by Plaintiff at or about the time alleged in the Complaint, which is expressly denied, they were caused solely and proximately by a known and recognized peril of the sea over which Defendant had no control and for which Defendant is not liable in tort.

FIFTH AFFIRMATIVE DEFENSE

If any equipment, tackle or tool broke and thereby contributed to causing Plaintiff's injuries, which is expressly denied, such breaking or failure was due to forces beyond Defendant's control and due to conduct of other parties and non-parties.

SIXTH AFFIRMATIVE DEFENSE

If Plaintiff sustained any losses, which losses are specifically denied, Defendant is not responsible for such losses as they were caused by Plaintiff's own willful failure to follow the directives of superiors.

SEVENTH AFFIRMATIVE DEFENSE

If any injuries were sustained by Plaintiff, which is expressly denied, they were caused solely and/or proximately by the natural progression of a pre-existing medical condition over which Defendant had no control and for which Defendant is not liable.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's injury, if any, was caused or contributed to by the negligence of the third parties whose identities are presently unknown to Defendant, and Defendant's liability, if any, should be reduced by the proportion caused or contributed by such persons.

NINTH AFFIRMATIVE DEFENSE

Plaintiff is barred from asserting any claim against the Defendant by reason of the applicable statutes of limitation.

TENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from asserting the claim herein against this Defendant by the doctrines of laches, estoppel and waiver.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's Complaint, and each cause of action thereof, is barred because Plaintiff comes to this Court with unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery in this lawsuit in that Plaintiff has not properly performed his duties which are conditions precedent to the accrual of any claim, and because Plaintiff has not dealt with this Defendant fairly and in good faith.

THIRTEENTH AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over the claims presented herein. Furthermore, Claimant is barred from bringing this action by the exclusive remedy provisions of the Longshore and Harbor Workers' Compensation Act, and any other applicable workers' compensation statutes.

WHEREFORE, this Defendant prays that Plaintiff's Complaint be dismissed; that judgment be entered for said Defendant and against Plaintiff; that Defendant recover from Plaintiff its costs of suit incurred herein, attorney's fees, punitive relief as to the Court may seem just and proper in the premises.

DATED: February 2, 1987.

LITTLER, MENDELSON,
FASTIFF & TICHY
A Professional Corporation

By: JAMES J. McMULLEN, JR.
James J. McMullen, Jr.
Attorneys for Defendant

CERTIFICATE OF SERVICE

I, BARBARA HALLMAN, declare that I am a citizen of the United States and employed in the City of San Diego, County of San Diego, California. I am over the age of 18 years and not a party to the within entitled action. My business address is 701 "B" Street, Suite 300, San Diego, California 92101.

On February 4, 1988, I caused a copy of the Answer to Complaint For Damages and Demand For Jury Trial to be mailed by depositing same with the United States Postal Service, by placing same in a postage prepaid envelope, addressed as follows:

Preston Easley, Esq.
Law Offices of Preston Easley
150 West Seventh Street, Suite 203
San Pedro, California 90731

I, BARBARA HALLMAN, declare under penalty of perjury, that the foregoing is true and correct.

Executed on February 4, 1988, at San Diego, California.

BARBARA HALLMAN

BARBARA HALLMAN

Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

No. 90-584

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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Attorneys for
Southwest Marine, Inc.

QUESTION PRESENTED FOR REVIEW

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?

LIST OF PARTIES

The following are the parties to this proceeding:

Byron Gizoni
Plaintiff-Respondent

Southwest Marine, Inc.
Defendant-Petitioner

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No. 90-584

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONER

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit[1] reversed and remanded the decision of the United States District Court for the Southern District of California. The District Court had granted the motion of Southwest Marine, Inc. for summary judgment on the ground that Byron Gizoni ("Gizoni") was a ship repairman covered by the Longshore Act[2] rather than a Jones Act seaman.[3]

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[1]909 F.2d 385 (9th Cir. 1990).

[2]Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter "Longshore Act" or "LHWCA".

[3]The Jones Act, 46 U.S.C. § 688(a).

JURISDICTION

Jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. § 688(a).

Sections 902(3), 902(3)(G), 902(4), 903(a), 905(a), and 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

STATEMENT OF THE CASE

Southwest Marine, Inc. ("Southwest Marine") operates a ship repair facility in San Diego, California, where it provides ship repair services to ocean-going vessels owned by the U.S. Government and commercial customers. That repair work frequently requires the use of floating platforms to position tools, equipment and supplies alongside the vessels under repair. The platforms are used to hold anchors, anchor chains, rudders, propellers and shafts removed from or installed on vessels in the shipyard.[4]

Some floating platforms are also used to provide additional work space for shipyard employees. However, none of the floating platforms have their own means of propulsion or steering, raked bows, navigation lights, or crew facilities of any type. Virtually every Southwest Marine maritime employee has walked across or worked on a floating platform during his employment.[5]

Gizoni worked as a rigger and rigger foreman under the direct supervision of the superintendent of the rigging department during his employment with Southwest Marine. His duties as a rigger

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[4]Joint Appendix ("J.A.") II.

[5]J.A. II, III.

foreman required him to supervise and participate in the loading of equipment, materials, supplies, and vessel components onto and off of vessels repaired at the shipyard. He was never assigned to any vessel. He never worked aboard vessels except to perform duties relating to the repair work performed by Southwest Marine for the vessel owner.[6]

Prior to April 6, 1987, a floating platform was secured to the apron of Southwest Marine's floating drydock, and to the rear of a Navy vessel in the shipyard for repair. The platform had been placed in that position for repair work on the rudder. Gizoni alleges that shortly after reporting for work on April 6, 1987, he was injured when his foot went through a hole in the platform.[7]

Gizoni received LHWCA benefits from Southwest Marine and subsequently filed a formal claim for benefits under the LHWCA. However, not satisfied with LHWCA benefits, Gizoni also filed a Jones Act suit against Southwest Marine on September 30, 1987, alleging, among other things, that he was a "seaman" injured as a result of his employer's negligence.[8]

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[6]J.A. II, III.

[7]J.A. II, III.

[8]Gizoni's suit, which included counts for maintenance and cure, and unseaworthiness, was filed September 30, 1987. The complaint is a standard seaman personal injury complaint in that it contains three standard seaman causes of action. The first cause of action is for negligence pursuant to the Jones Act, 46 U.S.C. § 688(a). The second cause of action alleges unseaworthiness. The third cause of action, although captioned "FOR MAINTENANCE AND CURE," alleges Gizoni sustained a disabling condition, great physical and mental pain, and that he would continue to incur medical and related expenses. All counts were dismissed when the District Court found that Gizoni was not a seaman as a matter of law and granted summary judgment to Southwest Marine. J.A. IV.

Southwest Marine filed its *Answer to Complaint* on February 4, 1988, alleging, *inter alia*, that Gizoni was not a Jones Act "seaman" and that his Jones Act and other claims were barred by the exclusive remedy provisions of the LHWCA.[9] On June 7, 1988, Southwest Marine filed its *Notice of Motion and Motion for Summary Judgment*, asserting the above defenses, and filed declarations which described Gizoni's job duties in detail. Oral argument was heard before the District Court on July 5, 1988 and the District Court filed its Order Granting Motion for Summary Judgment on September 16, 1988.[10]

On September 16, 1988, Gizoni filed a Notice of Appeal of the District Court judgment to the United States Court of Appeal for the Ninth Circuit. Gizoni submitted his brief to the court on or about February 28, 1989. Southwest Marine and *amicus curiae*, consisting largely of maritime employers, filed their briefs with the court on May 22, 1989. The parties argued before the Ninth Circuit on March 9, 1990. On July 24, 1990, the Ninth Circuit filed its decision reversing the judgment of the District Court. The Ninth Circuit held that Gizoni was entitled to proceed to a jury trial on his Jones Act and other seaman claims.[11]

SUMMARY OF ARGUMENT

The Ninth Circuit decision that a ship repairman who works on floats and platforms to repair various vessels in a shipyard is

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[9]J.A. V. The test for seaman status for unseaworthiness and maintenance and cure is identical to that for Jones Act seaman status. *Hall v. Diamond Marine Co.*, 732 F.2d 1246, 1248-9 (5th Cir. 1984); *Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380, 1382-2 (9th Cir. 1981). Therefore, the suit is hereinafter referred to as a Jones Act suit rather than a seaman personal injury suit.

[10]J.A. III.

[11]J.A. II.

entitled to proceed to a jury trial on a Jones Act seaman claim conflicts with the congressional intent behind the LHWCA and its amendments. Moreover, it imposes an unreasonable economic burden on LHWCA employers and creates a burden on employees, employers and the courts due to the duplicity of litigation and the multiple risks resulting from uncertainty as to coverage.

The Ninth Circuit decision also creates an unnecessary economic burden on LHWCA employers by requiring that they maintain both Jones Act and LHWCA insurance coverage for the same employees. Those financial and administrative burdens are imposed on an industry already threatened by financial problems associated with foreign competition, defense cutbacks, and high costs for LHWCA insurance. Land-based maritime employees, on the other hand, are beset with uncertainty as to the existence and source of a remedy for injuries despite their employment on a covered situs.

The situation described above conflicts with the congressional intent behind the LHWCA and its amendments to provide a uniform, no-fault compensation system to land-based maritime employees on the waterfront without the expense, uncertainty, and delay that tort actions entail. Moreover, the Ninth Circuit decision conflicts with the congressional intent behind the 1972 and 1984 LHWCA Amendments to immunize shipyards from multiple liabilities.

Restricting LHWCA coverage by permitting a Jones Act jury to expand an exemption to that coverage is inconsistent with congressional intent. The Court's decisions confirm that the purposes of the LHWCA were for expansive coverage and to supplant the Jones Act as a remedy for injuries to land-based maritime employees on a covered situs.

Employees in occupations covered by the LHWCA are land-based maritime employees as a matter of law and, therefore, are precluded from pursuing Jones Act claims against their statutory LHWCA employers. Indeed, employees in occupations covered

by the LHWCA are barred from pursuing Jones Act claims in the same way that such employees are barred from pursuing FELA claims and LHWCA Section 5(b) claims against their LHWCA statutory employers and unseaworthiness claims against third persons.

Where an employee is injured on a covered situs and is in an occupation covered by the LHWCA (or indisputably spends part of his time in such activities), that employee is barred from pursuing a Jones Act claim to a jury to determine seaman status. Summary judgment must be granted to the LHWCA statutory employer. However, where that employee's status cannot be determined by the court as a matter of law, Congress intended that the court defer to the LHWCA administrative agency charged by Congress with the authority and expertise to render LHWCA decisions, which includes addressing the threshold questions of LHWCA and Jones Act coverage.

However, as the District Court properly held, Gizoni is simply not a Jones Act seaman as a matter of law. Rather, he is a land-based maritime employee specifically covered by the LHWCA. His exclusive remedy is provided by the LHWCA. The Ninth Circuit has gone beyond the limits prescribed by Congress in allowing land-based maritime employees on a covered situs in occupations specifically covered by the LHWCA to pursue Jones Act claims against their statutory employers. Therefore, the Ninth Circuit decision that Gizoni is entitled to a jury trial on seaman status should be reversed.

ARGUMENT

I

THE APPROACH OF THE NINTH CIRCUIT RESURRECTS THE MISCHIEF CONGRESS INTENDED TO CORRECT WITH THE LHWCA AND ITS AMENDMENTS.

"Statutory language must be read in the light of the mischief to be corrected and the end to be attained."[12] Thus, coverage of the LHWCA and its amendments, and conversely the reach of the Jones Act, must be determined in light of the mischief to be corrected.

The Ninth Circuit held that Gizoni, a land-based ship repairman injured on a covered situs, is entitled to a jury trial on his Jones Act seaman status claim. However, the Ninth Circuit simply failed to consider the congressional intent behind the LHWCA and its amendments. The decision of the Ninth Circuit thus resurrects the mischief which Congress intended to correct with the LHWCA and its amendments.

Congress was concerned even prior to the 1972 LHWCA Amendments that the then existing "jurisdictional dilemma" regarding the LHWCA "press[ed] as sharply on employers as employees."[13] In *Davis v. Department of Labor and Industries*,[14] the Court emphasized that the "employer's contribution to a state insurance fund may . . . wholly fail to protect him against the liabilities for which it was specifically

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[12]*McDermott International, Inc. v. Wilander*, ___ U.S. ___, 111 S.Ct. 807, 814 (1991).

[13]*Davis v. Department of Labor and Industries*, 317 U.S. 249, 255 (1942).

[14]*Id.*

planned." The Court thus recognized that depending on the Court's determination in that case the employer might "not only lose the benefit of the state insurance to which [the employer] ha[d] been compelled to contribute . . . ; [the employer] might also . . . become liable for substantial additional payments."[15]

A similar result ensues from the Ninth Circuit decision. A statutory LHWCA employer must now bear the high cost of Jones Act and LHWCA insurance as well as the cost of administering and defending inconsistent LHWCA and Jones Act claims arising out of the same incident. The Ninth Circuit decision thus imposes an unreasonable economic burden on an industry already troubled by financial problems associated with foreign competition, overregulation, defense cutbacks, and high insurance costs.[16]

These additional economic and administrative burdens conflict with the congressional intent behind the 1972 and 1984 Amendments to the LHWCA to immunize shipyards and other statutory employers from multiple liabilities for injuries to their LHWCA employees.[17] The approach of the Ninth Circuit again exposes shipyards and other statutory LHWCA employers to multiple liabilities, in addition to the generous LHWCA benefits.

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[15]*Id.*

[16]*Cf. Oversight Hearings on the LHWCA, Part 1: Hearing Before the Subcomm. on Compensation, Health and Safety, House Education and Labor Comm.*, 95th Cong. 1st Sess. (1978), and *Hearings on S.1182 Before The Subcommittee on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. (1981) (Statements of Edwin Hood, President of the Shipbuilders Council, and Stewart Niles, Special Counsel, Shipbuilding Council).

[17]*See Bush v. Eagle-Picher*, 927 F.2d 445 (9th Cir. 1991); and S.Rep. No. 1125, 92nd Cong., 2d Sess., 9-10 (1972); H.R. Rep. No. 1441, 92nd Cong., 2d Sess., 6 (1972) (regarding the 1972 LHWCA Amendments).

"In enacting the LHWCA, Congress intended that it be the sole and exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award."[18] The Ninth Circuit decision makes the LHWCA a "stepping stone" to a possible jury award.[19]

Moreover, Congress enacted the LHWCA and its amendments in part to ensure that a uniform compensation remedy existed for injuries of land-based maritime employees on the waterfront.[20]

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[18]*Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132 (5th Cir. 1991).

[19]The congressional intent that the LHWCA be the employee's exclusive remedy is confirmed by the Senate Report on the 1984 Amendments:

> In amending the act today, we are strengthening further the language in section 905(b) to provide statutory immunity to shipyards against such negligence actions. We believe this achieves the goal of the conferees of making workers' compensation under the Longshore Act the exclusive remedy against an employer and insulating the latter from multiple liability. [S.Rep. on S.38, LHWCA Amendments of 1984 (Sept. 20, 1984).]
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> * * *
>
> It benefits certain employers in the shipbuilding industry by restoring an original purpose of workers' compensation, namely to immunize employers from tort suits as the *quid pro quo* for paying compensation. [S.Rep. on S.38, LHWCA Amendments of 1984 (Sept. 20, 1984).]

[20]*Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 273 (1977); *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 120 (1962).

However, under the Ninth Circuit approach land-based maritime employees engaged in occupations specifically enumerated in the LHWCA on a covered situs could, by the decision of a jury, be excluded from LHWCA coverage.

With the LHWCA Congress intended to eliminate the "uncertainty" of a compensation remedy for injuries to land-based maritime employees on navigable waters.[21] Yet, the Ninth Circuit decision reintroduces uncertainty as to the existence and source of a compensation remedy for injuries of land-based maritime employees on a covered situs who are engaged in specific occupations identified in the LHWCA.[22] Unlike the LHWCA, the Jones Act is not a "no-fault" system; negligence must be established. Thus, many land-based maritime employees, if denominated Jones Act seamen, may end up with no remedy at all for work-related injuries on actual navigable waters if negligence

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[21]*Calbeck, supra*, 370 U.S. at 124, 125.

[22]Notably, the Ninth Circuit relied on *Peterson v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732 (6th Cir. 1986). In *Peterson*, the employee, a machinist on a railroad car ferry, claimed seaman status under the Jones Act. The court applied the "aid in navigation" test and found him to be a seaman under the Jones Act. That is, of course, the same test "jettisoned" by the Court in *Wilander*. More importantly, the Ninth Circuit failed to recognize that *Peterson* is inconsistent with the Court's decisions in *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), and *Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 110 S.Ct. 381 (1989), and the congressional intent behind the LHWCA and its amendments. Indeed, the *Peterson* court failed to distinguish, let alone mention, the Court's decision in *O'Rourke*. That is incredible because Peterson, like O'Rourke, was a railroad employee. In fact, Peterson and Schwalb worked for the same railroad company.

cannot be proven. "Such an anomalous result could not have been intended by Congress."[23]

The Ninth Circuit decision also conflicts with the need of maritime employers and employees alike to quickly and efficiently determine whether a particular employee falls under the Jones Act or the LHWCA. Applying the Ninth Circuit decision, however, even the "most competent counsel may be unable to predict on which side of the line particular employment will fall."[24]

Indeed, continued confusion over whether an employee is covered by the LHWCA or the Jones Act may prompt many employers to simply controvert LHWCA compensation payments on the grounds that the employee is excluded from LHWCA coverage as "a member of a crew of a vessel."[25] Such a result would conflict with one of the primary purposes of the LHWCA: to provide to maritime employees "prompt relief without the expense, uncertainty, and delay that tort actions entail."[26]

Permitting a trial court to reconsider issues that are or should be decided by the LHWCA administrative system[27] effectively defeats the purpose of the LHWCA.[28] "Instead of creating certainty for both employer and employee, permitting a trial court

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[23]*Director, OWCP v. Perini North River Associates (Churchill)*, 459 U.S. 297, 324 (1983).

[24]*Davis, supra*, 317 U.S. at 255.

[25]33 U.S.C. §§ 902(3)(G), 914(d); and *Wilander, supra*, 111 S.Ct. at 807.

[26]*Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 637 (1983).

[27]The LHWCA system is administered by the U.S. Department of Labor. *See Churchill, supra*, 459 U.S. at 303-304.

[28]*Fontenot, supra*, 923 F.2d at 1132.

to redetermine the coverage issue reintroduces uncertainty for both."[29] Allowing a trial court and the U.S. Department of Labor to reach inconsistent determinations on the coverage issue also allows an injured worker to possibly receive both a jury award and a LHWCA remedy, despite Congress' intention that he receive one or the other, but not both.[30]

Moreover, the same can be said of Jones Act lawsuits that was said in 1972 of unseaworthiness lawsuits: "The social costs of these lawsuits, the delays, crowding of court calendars, and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers."[31] The Ninth Circuit approach entails the same social costs, delays, crowding of court calendars, and the need for lawyers services for Jones Act lawsuits that Congress attempted to obviate for unseaworthiness lawsuits with the 1972 Amendments. Such results could occur without any real increase in benefits to LHWCA employees who, perhaps, could end up losing LHWCA benefits.

The approach of the Fifth Circuit as set forth in *Pizzitolo v. Electro-Coal Transfer Co.*[32] and *Fontenot v. AWI, Inc.*[33] avoids such mischief and is consistent with the intent of Congress.[34]

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[29]*Id.; See also Wilander, supra*, 111 S.Ct. at 818.

[30]*Fontenot, supra*, 923 F.2d at 1137.

[31]*Caputo, supra*, 432 U.S. at 263, n.18.

[32]812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988).

[33]*Supra*, 923 F.2d at 1127.

[34]In *Fontenot* and *Pizzitolo*, the Fifth Circuit essentially held that the maritime employees were covered by the LHWCA and therefore ineligible for consideration for Jones Act seaman status. Thus, the statutory employers' motions for summary judgment (continued...)

Under that approach, Gizoni, a land-based ship repairman employed by a statutory employer on a covered situs, is covered exclusively by the LHWCA and is not entitled to proceed to a jury trial to redetermine Jones Act seaman status.

II

THE CONGRESSIONAL INTENT WAS FOR THE LHWCA AND ITS AMENDMENTS TO SUPPLANT THE JONES ACT AS A REMEDY FOR LAND-BASED MARITIME WORKERS INJURED ON A COVERED SITUS.

McDermott International, Inc. v. Wilander[35] makes clear that the LHWCA and Jones Act are "mutually exclusive; a 'seaman' under the Jones Act" is excluded from the LHWCA as a "master or member of a crew of a vessel . . . ." Thus, the Court confirmed that the congressional intent was for the LHWCA to supplant the Jones Act as a remedy for land-based maritime employees covered by the LHWCA and injured in the course of their employment for a statutory employer.[36]

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[34](...continued)
were granted. *Fontenot, supra*, 923 F.2d at 1127; *Pizzitolo, supra*, 812 F.2d at 977.

[35]*Supra*, 111 S.Ct. at 807, 815.

[36]Section 2(4) of the LHWCA, 33 U.S.C. § 902(4), defines a "statutory employer" as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 67, 78-79 (1979). In *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), the Court held that a "statutory employer" (continued...)

The Court has emphasized:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen . . . .[37]

In this case, the Ninth Circuit failed to recognize that it sailed in waters occupied, indeed dominated, by the LHWCA, and expanded a remedy not otherwise available to land-based maritime employees.[38] Furthermore, expanding the Jones Act remedy to land-based maritime employees covered by the LHWCA would work to the detriment of such employees because by allowing Jones Act coverage the Ninth Circuit is in effect depriving such employees of their LHWCA remedy.

Southwest Marine respectfully maintains, in light of the congressional intent, that land-based maritime employees on a covered situs engaged in occupations specifically enumerated in

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[36](...continued)
existed as long as the employer had any employee engaged in "maritime employment" and that it was not necessary that the injured employee be the one that made his employer a "statutory employer." *Id.* at 341; *Churchill*, 459 U.S. at 311, n.21 (1983). It would not appear that there is any dispute that Southwest Marine is a "statutory employer."

[37]*Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 327 (1990).

[38]In construction of the legislative history of the LHWCA, the authors are indebted to Kenneth Engerrand for his several works on this topic and specifically, *Seaman's Status Reconsidered*, Kenneth G. Engerrand and Jeffrey Bale, 24 S.Tex. L.J. 431 (1984), and Kenneth G. Engerrand, *Seaman's Status Reconstructed*, 32 S.Tex. L.R. ___ (1991).

LHWCA Section 2(3) are covered exclusively by the LHWCA.[39] It follows that a land-based ship repairman, such as Gizoni, who is employed on a covered situs is not entitled to proceed to a jury trial for reconsideration of Jones Act seaman status.

III

EMPLOYEES IN OCCUPATIONS ENUMERATED IN THE LHWCA ARE LAND-BASED MARITIME EMPLOYEES AS A MATTER OF LAW; THEREFORE, SUCH EMPLOYEES ARE PRECLUDED FROM PURSUING JONES ACT CLAIMS AGAINST THEIR STATUTORY EMPLOYERS.

In *Wilander*, the Court helped to dispel some of the confusion over seaman status and held in part that a "seaman" under the Jones Act and a "master or member of a crew of a vessel" pursuant to the LHWCA should be defined "solely in terms of the employee's connection to a vessel."[40] Thus, a seaman need not aid in the navigation of a vessel. However, in order to qualify as a seaman under the Jones Act, an employee must have "a definite and permanent connection with a vessel and an obligation to forward her enterprise."[41] Moreover, the employee's duties must "contribute to the function of the vessel or to the accomplishment of its mission."[42]

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[39]*See Fontenot, supra*, 923 F.2d at 1127; *Chauvin v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735 (5th Cir. 1989); *Pizzitolo, supra*, 812 F.2d at 977; *Williams v. Weber Management Services, Inc.*, 839 F.2d 1039 (5th Cir. 1987).

[40]*Supra*, 111 S.Ct. at 817.

[41]*Id.*

[42]*Id.*

The Court emphasized in *Wilander* that the Jones Act and LHWCA are a "pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based employees." Further, the Court noted that the subsequently enacted "LHWCA restricted the definition of 'seaman' in the Jones Act only to the extent that 'seaman' . . . [included] land-based employees."[43] Consequently, under *Wilander* a maritime employee can be a Jones Act "seaman" only if that employee is not a land-based employee covered by the LHWCA.

In the present case, the Court has agreed to address whether employees in occupations specifically covered by the LHWCA are nonetheless entitled to proceed to a jury trial to determine their alleged status as Jones Act seamen.[44] Consequently, in reaching that decision, the Court should be guided not only by the history and congressional intent behind the Jones Act, but more importantly by the history and congressional intent behind the subsequently enacted LHWCA and its amendments.

In *Southern Pacific Co. v. Jensen*,[45] the Court declared, prior to the enactment of the LHWCA, that states were constitutionally barred from applying their compensation systems to maritime injuries seaward of the water's edge because that would interfere with the overriding federal policy of a uniform maritime law.

Five months after *Jensen*, Congress unsuccessfully attempted to authorize states to provide workers' compensation to maritime

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[43]*Id.*

[44]This case does not involve the more general "harbor worker" category of "maritime employee", but rather only the specific occupation of "ship repairman." *See Stewart v. Brown and Root, Inc.*, 7 BRBS 356 (1978) (defining the term "harbor worker"), *aff'd sub nom., Brown and Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980).

[45]244 U.S. 205 (1917).

employees injured on navigable waters in order to remove the uncertainty of compensation coverage for workers whose duties were partly on land and partly on navigable waters.[46] That effort was struck down as unconstitutional.[47] In 1922, Congress again attempted to authorize state laws to protect employees injured on navigable waters.[48] That effort was also held invalid.[49]

In 1927, Congress successfully responded to *Jensen* and enacted the LHWCA to provide a remedy to maritime workers other than a "master or member of a crew" injured in the course of their employment on navigable waters.[50] The 1927 LHWCA was a typical workmen's compensation system "compensating an employee for injuries arising out of and in the course of employment."[51] It was designed to fill the void created by the inability of the states to remedy injuries on navigable waters.[52]

As originally enacted, however, the LHWCA provided coverage for injuries occurring "upon the navigable waters of the United States" and permitted compensation awards only "if recovery . . . through workmen's compensation proceedings

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[46]*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

[47]*Id.*

[48]*State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

[49]*Id.*

[50]In addition, since its inception the LHWCA has contained an exclusive liability provision for statutory employers. *See* Act of March 4, 1927, c.509, § 5, 44 Stat. 1426.

[51]*Caputo, supra*, at 258.

[52]*Id.*

[could] not validly be provided by state law."[53] Thus, the 1927 LHWCA had only a "situs" test; it provided coverage only to "those employees of statutory 'employers' injured while working upon navigable waters in the course of their employment."[54]

Congress amended the LHWCA in 1972, partly in response to the Court's decision in *Nacirema Operating Co. v. Johnson*,[55] which held that the LHWCA did not cover longshoremen killed or injured on a pier while engaged in loading a vessel. The 1972 Amendments, among other things, expanded the coverage of the LHWCA shoreward. Congress broadened the definition of "navigable waters of the United States",[56] while amending the definition of persons covered by the LHWCA.[57]

With the expansion of the definition of "navigable waters"[58] Congress was required to affirmatively describe the class of workers it desired to compensate.[59] It thus added the requirement

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[53]*Id.*, at 258, 259.

[54]*Churchill, supra*, 459 U.S. at 312, 315.

[55]396 U.S. 212 (1969).

[56]Section 3(a), prior to the 1972 Amendments, provided in pertinent part that "Compensation shall be payable . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . ." 33 U.S.C. § 903(a).

[57]*Caputo, supra*, 432 U.S. at 263, 264.

[58]33 U.S.C. § 903(a).

[59]The Legislative Reports which summarized the general purposes of the legislation and contained an analysis of the changes proposed for each section made clear that with the 1972 Amendments *Congress did not "intend to cover employees who are*

(continued...)

that the injured worker be "engaged in maritime employment," but the "member of crew" exception remained unchanged.[60]

The LHWCA now provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3) (deemed the "status" test), if the disability or death results from an injury in the course of employment upon "the navigable waters of the United States"[61] (deemed the "situs" test). Hence, a worker must satisfy both a "status" and a "situs" test.[62] The status test requires in part that an employee be engaged in "maritime employment," which is defined as "including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . . ."[63]

Congress thus sought to "extend coverage to protect additional maritime workers,"[64] not to withdraw coverage from those workers injured on actual navigable waters in the course of their employment for a statutory employer who would have been covered by the LHWCA before 1972.[65] Moreover, the legislative

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[59](...continued)
not engaged in loading, unloading, *repairing, or building a vessel, just because they are injured in an area adjoining navigable waters* used for such activity." (Emphasis supplied.) *Churchill, supra*, 459 U.S. at 318.

[60]33 U.S.C. § 902(3).

[61]33 U.S.C. § 903(a).

[62]*Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 416-417 (1985).

[63]33 U.S.C. § 902(3).

[64]S.Rep. No. 1125, 92nd Cong., 2d Sess., 1 (1972).

[65]*Churchill, supra*, 459 U.S. 297.

history behind the 1972 Amendments and the pertinent decisions of the Court to date indicate that Congress intended "to extend landward coverage to those specifically included occupations" in the "explicitly enumerated categories of activities in the § 2(3) definition of 'employee.'"[66]

The Court's decisions in *Northeast Marine Terminal Co., Inc. v. Caputo,*[67] *P.C. Pfeiffer Co., Inc. v. Ford,*[68] and *Director, OWCP v. Perini North River Associates (Churchill)*[69] confirm the conclusion that the LHWCA and its amendments were intended to cover persons, such as Gizoni, who are (1) injured on a maritime situs, (2) employed by a "statutory employer" and (3) engaged in an occupation enumerated in Section 2(3) of the LHWCA.

In *Northeast Marine Terminal Co., Inc. v. Caputo,*[70] the Court was asked to determine whether two maritime workers injured while working on the New York City waterfront were covered by the LHWCA and were within the reach of the 1972 Amendments. Blundo was a checker who checked and recorded cargo in containers as it was loaded and unloaded from vessels, barges or containers.[71] Caputo was a member of a regular longshoring gang, but also worked "casual labor" out of the union hiring hall when not needed for his regular longshoring gang.[72]

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[66]*Id.*, at 318, 319, n. 27.

[67]432 U.S. 249 (1977).

[68]444 U.S. 69 (1979).

[69]459 U.S. 297 (1983).

[70]432 U.S. 249 (1977).

[71]*Caputo, supra,* 432 U.S. at 252, 253.

[72]*Id.*

The Court observed that the relevant terms ("maritime employment," "longshoreman," and "longshoring operations") were not defined by Congress in either the text of the LHWCA or its legislative history.[73] However, the Court emphasized:

> The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation.[74]

The Court then concluded that in view of the liberal and expansive interpretation mandated, plus the congressional desire to accommodate the Act to modern technological change, it was apparent that Blundo was a statutory LHWCA employee. His job was an integral part of the unloading process as altered by the advent of containerization. Therefore, Blundo's job duties were "included in the category of 'longshoring operations.'"[75]

With respect to Caputo, the Court relied on the congressional intent to provide a "uniform compensation system to apply to employees who would otherwise be covered by [the LHWCA] for part of their activity."[76] The Court found that Caputo, who was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck, was also covered by the LHWCA as a longshoreman.[77]

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[73]*Id.* at 266.

[74]*Id.* at 269.

[75]*Id.* at 272.

[76]*Id.* at 274.

[77]*Id.*

Significantly, the Court emphasized:

> The Act focuses primarily on occupations -- longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered for only part of their activity.[78]

Moreover, the Court rejected the "Point of Rest" theory advanced by the petitioners to defeat LHWCA coverage.[79] The Court reasoned that argument was inconsistent with the congressional intent behind the 1972 Amendments because it would restrict LHWCA coverage. The holding and rationale of *Caputo* thus support the conclusion that a land-based ship repairman employed by a statutory employer on navigable waters is covered exclusively by the LHWCA.

Caputo was reaffirmed one year later in *P.C. Pfeiffer Co., Inc. v. Ford*.[80] *Ford* involved two maritime workers engaged in occupations covered by the LHWCA. Ford was injured on a public dock while fastening military vehicles that had been loaded onto railroad flat cars the day before. Bryant was a cotton header

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[78] *Id.*

[79] The "Point of Rest" theory was "claimed [by the petitioners] to be a term of art in the industry that denote[d] the point where the stevedoring operation ends (or, in the case of loading, begins), and the terminal operation function begins (or ends, in the case of loading)." *Id.* at 275-276. The petitioners had claimed that "the maritime employment of longshoremen included only the 'stevedoring activity of the longshore gang'" in the case of unloading of vessels before the "point of rest" and in the case of loading of vessels after the "point of rest." *Id.*

[80] 444 U.S. 69 (1979).

injured while unloading cotton from a dray wagon into a pier warehouse.

The Court held both workers were engaged in maritime employment as longshoremen at the time of their injuries. They were engaged in the intermediate steps of moving cargo between ship and land transportation. Emphasizing that Congress, by virtue of Section 2(3), had adopted an "occupational test" which was distinct from the situs requirement contained in Section 3(a), the Court confirmed that the term "maritime employment" embodied an "occupational rather than a geographic concept."[81]

Key to *Ford* is the Court's conclusion that both Ford and Bryant were "the kind of land-based employees that Congress intended to encompass within the term 'maritime employee.'"[82] Likewise, Gizoni is precisely the kind of land-based maritime employee that Congress intended to encompass within the term "ship repairman."[83]

Finally, in *Director, OWCP v. Perini North River Associates (Churchill)*,[84] the Court held that a marine construction worker injured while on the deck of a cargo barge was engaged in

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[81] *Id.* at 80.

[82] *Id.* at 82.

[83] *See Ford, supra*, 444 U.S. at 80-81, wherein the Court noted that prior to the 1972 Amendments "the Senate Subcommittee on Labor heard testimony [from one witness] that 30% - 35% of ship repair work . . . [was] . . . done on land[,]" and "that the same witness when asked *if his company would favor extending federal benefits to all ship repairmen instead of continuing the pre-1972 practice of limiting federal compensation to ship repairmen who worked on the water*[,]" stated that "we would interpose no objection. . . ." (Emphasis supplied.)

[84] 459 U.S. 297 (1983).

"maritime employment" pursuant to Section 2(3) and covered by the LHWCA. Churchill was in charge of all work performed on cargo and supply barges, which included loading and unloading caissons and other materials for the construction of a foundation for a sewage disposal plant on the Hudson River.[85] The Court noted that in *Caputo* and *Ford* it had recognized that the status test is an occupational requirement.[86]

Thus, the legislative history behind the 1972 Amendments and the Court's decisions in *Caputo*, *Ford*, and *Churchill* establish that the Section 2(3) focus on occupations evinces a congressional intent to sweep employees in occupations enumerated in the LHWCA within the exclusive coverage of the LHWCA.[87] Gizoni

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[85]The Court's decision in *Churchill* is arguably inconsistent with *Wilander*. Under the *Wilander* test, Churchill could conceivably be entitled to proceed to a jury trial to determine his status as a Jones Act seaman because his duties, at least arguably, contributed to the purpose or function of a vessel (the cargo or supply barges), and he, again arguably, had a more or less permanent connection to a vessel in navigation. Southwest Marine urges the Court that the best means of reconciling *Churchill* with *Wilander* is for the Court to adopt the approach of the Fifth Circuit based on the thorough and well crafted decisions of Judge Wisdom in *Fontenot, supra*, 923 F.2d at 1127, and Judge Davis in *Pizzitolo, supra*, 812 F.2d at 977.

[86]*Churchill, supra*, 459 U.S. at 323, n. 32.

[87]Moreover, in *Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 110 S.Ct. 381 (1989), three justices joined in the majority opinion, but concurred specially and concluded that so long as an employee "'spends some of his time in indisputably longshoring operations' then the employee is covered by the LHWCA even if he was not so engaged at the specific time of his injury." *See Fontenot, supra*, 923 F.2d at 1129. The same reasoning applies no less to an employee who spends part of his

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is a land-based ship repairman employed by a statutory employer on navigable waters. As such, he is covered by the LHWCA and is not entitled to proceed to a Jones Act jury trial for a redetermination of seaman status.[88]

IV

EXPANSIVE COVERAGE UNDER THE LHWCA IS CONSISTENT WITH THE CONGRESSIONAL INTENT BEHIND THE LHWCA AND ITS AMENDMENTS TO PROVIDE A UNIFORM COMPENSATION SYSTEM FOR LAND-BASED MARITIME EMPLOYEES.

Coverage by the LHWCA has been the source of confusion and uncertainty since it was enacted in 1927. Indeed, employees and employers alike have been thrust on the "horns of [a] jurisdictional dilemma. . . ."[89]

Nevertheless, when addressing issues of jurisdiction under the LHWCA, the Court has been guided by the purposes behind the Act and its amendments. The Court has repeatedly emphasized that the LHWCA was "designed to ensure that a compensation remedy existed for all injuries sustained by employees [of statutory employers] on navigable waters, and to avoid uncertainty . . . as to the source of that remedy."[90] Moreover, the Senate and the

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[87](...continued)
time in indisputably ship repair, even if he was not so engaged at the time of his injury. However, in the present case, Gizoni was also engaged in ship repair at the time of his injury.

[88]*See Fontenot, supra*, 923 F.2d at 1127; *Williams, supra*, 839 F.2d at 1039; *Pizzitolo, supra*, 812 F.2d at 977.

[89]*Churchill, supra*, 459 U.S. at 309.

[90]*Id.* at 310; *Calbeck, supra*, 370 U.S. at 124.

House of Representatives committee reports before enactment of the LHWCA firmly establish Congress' intent to achieve uniformity in this area as early as 1921.[91]

Those principles apply no less to the present case. The Ninth Circuit approach, however, conflicts with those principles. Indeed, under the Ninth Circuit approach a land-based maritime employee engaged in an occupation covered by the LHWCA while employed on a covered situs could be denied LHWCA coverage based on a Jones Act jury finding of seaman status.

Moreover, under prior Ninth Circuit case law, almost any evidence would be sufficient for a Jones Act claim to get to a

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[91] Clearly the whole employment of a longshoreman must be covered by a single act if he is to receive satisfactory protection. He must not be left in doubt as to which jurisdiction he must apply for his compensation. He must not be forced to apply to one jurisdiction in the event that an accident happens on land, to another in the event that an accident happens on the ship, with totally different remedies in each case, and be in doubt as to where to apply if he is injured while in the "twilight zone." The employer, furthermore, should not be compelled to divide his compensation insurance risk between two separate statutes, with necessarily varying terms. [S.Rep. No. 94, 67th Cong., 1st Sess., 5 (1921).]

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The situation as it exists today is exceedingly confused and disconcerting with reference to remedies depending on the peculiar character of the longshoreman's employment at the moment of injury. [H.R. Rep. No. 639, 67th Cong., 2d Sess., 58 (1921).]

jury.[92] That result is simply inconsistent with the congressional intent for a uniform compensation system to apply to land-based maritime employees injured on a covered situs.

Further, the Court has long held that the later enacted LHWCA "must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results."[93] It would be incongruous for a land-based ship repairman injured on navigable waters while employed by a statutory employer to be excluded from LHWCA coverage. It would also be anomalous for such an employee to be deprived of a remedy, if deemed a Jones Act seaman and there was a finding of no employer negligence.

Nevertheless, the Court's decisions in *Calbeck,*[94] *Caputo,*[95] and *Ford*[96] establish that the LHWCA and its amendments were intended by Congress to provide a uniform compensation system to land-based maritime employees on a covered situs and that the LHWCA reaches at least those persons, such as Gizoni, engaged in occupations specifically enumerated in Section 2(3).

In *Calbeck,*[97] the Court of Appeal had denied LHWCA coverage to two shipyard workers injured while engaged in the construction of a vessel afloat on navigable waters. The Court reversed and held that LHWCA coverage did not depend on

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[92] *See Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983).

[93] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Caputo, supra*, 432 U.S. at 268.

[94] *Supra*, 370 U.S. 114 (1962).

[95] *Supra*, 432 U.S. 249 (1977).

[96] *Supra*, 444 U.S. 69 (1979).

[97] *Supra*, 370 U.S. 114 (1962).

whether state compensation laws apply or might constitutionally apply. The Court noted that in 1927 Congress was confronted with the twin problems of the lack of an available compensation remedy for many maritime injuries (those seaward of the *Jensen* line), and the uncertainty created by judicial decision in the administration of compensation.

However, one of the chief purposes of the LHWCA was to dispel that confusion.[98] Congress had thus "turned to a uniform federal compensation law as an instrument for dealing" with both problems.[99] The Court therefore held that both shipyard workers were covered, emphasizing that the LHWCA was "designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source . . . of that remedy."[100]

In the same vein, in *Caputo*[101] the Court emphasized that the LHWCA applied to those persons on a covered situs who are in occupations specifically covered by the LHWCA or who indisputably spend at least part of their time in occupations specifically covered by the LHWCA. Blundo's duties were an integral part of the "longshoring operations." And Caputo's duties brought him within the reach of the 1972 Amendments as a "longshoreman." In the present case, Gizoni's duties as a land-based ship repairman for a shore-based ship repair yard on a covered situs also establish that Gizoni is covered by the LHWCA.

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[98]*Id.* at 126.

[99]*Id.* at 120.

[100]*Id.* at 124.

[101]*Supra*, 432 U.S. 249 (1977).

In *Ford*,[102] the Court emphasized that with the 1972 Amendments Congress intended that a worker's eligibility for LHWCA benefits not depend on whether the worker was injured while walking down the gangway or while taking his first step onto land. Congress also did not intend that a worker's eligibility for LHWCA benefits depend on whether a land-based maritime worker was injured while working on shore or while working on a floating platform, or indeed even a barge, in the course of ship repair activity. It was for that reason that Congress adopted an "occupational test" for employees injured on a covered situs. It is for the same reason that Gizoni is covered by the LHWCA.

The Ninth Circuit approach thus conflicts with the congressional goal of "a single, uniform standard of coverage" under the LHWCA because any "worker's coverage would depend on the job assignment policies of his employer."[103] In contrast, a definition of "maritime employment" that embraces any worker in an occupation specifically enumerated in the LHWCA and injured on a covered situs will enable both workers and employers to predict with reasonable assurance who is protected by the LHWCA.[104]

The approach of the Ninth Circuit also requires "employees to determine with certainty before bringing their actions that factual question over which courts regularly divide . . . ."[105] "As penalty for error, the injured employee may . . . suffer serious

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[102]*Ford, supra*, 444 U.S. at 75.

[103]*Ford, supra*, 444 U.S. at 84.

[104]*Id.* at 85; *see also General Dynamics Corp. v. Sacchetti*, 681 F.2d 37 (1st Cir. 1982); *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070 (4th Cir. 1980).

[105]*Davis, supra*, 317 U.S. at 254.

financial loss through the delay and expense of litigation . . . ."[106]

The Court acknowledged almost 50 years ago that

> [s]uch a result defeats the purpose of the . . . [LHWCA], . . . which seeks to give . . . the justice involved in the modern principle of compensation" . . . [and] . . . sure and certain relief for workmen. [Footnote omitted.][107]

It was precisely that uncertainty that the LHWCA and its amendments were designed to dispel.[108] Therefore, the decision of the Ninth Circuit, holding that Gizoni (who is covered by the LHWCA) is entitled to a jury trial on his Jones Act "seaman" claim, must be reversed. Gizoni was engaged in an occupation expressly enumerated in the LHWCA while employed for a statutory employer on a covered situs. Thus, regardless of what

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[106]*Id.*

[107]*Id.*

[108]*See* S.Rep. No. 1125, 92nd Cong., 2d Sess., 2 (1972). The goal of uniform coverage was also of concern during the Congressional discussions regarding the 1984 Amendments to the Act:

> The Longshore Act has not proved to be the model and uniform compensation program it was represented to be when the 1972 amendments were passed, but when the Senate passed the conference report to S. 38, I strongly believe that we will be close to the goal of providing fair and equitable compensation to longshoremen and harbor workers who are injured while working over the navigable waters of the United States. [H.R. Rep. No. 1441, 92nd Cong., 2d Sess., 10-11 (1972).]

a jury may decide, Gizoni is ineligible for consideration as a Jones Act seaman.

V

MARITIME EMPLOYEES IN OCCUPATIONS COVERED BY THE LHWCA ARE PRECLUDED FROM PURSUING JONES ACT CLAIMS IN THE SAME FASHION THAT SUCH EMPLOYEES ARE PRECLUDED FROM PURSUING FELA CLAIMS AGAINST THEIR STATUTORY EMPLOYERS.

The Jones Act established a uniform system of seaman tort law parallel to that available to employees of interstate railway carriers under the Federal Employers' Liability Act ("FELA").[109] In demarcating coverage between the FELA and the LHWCA, the Court has adopted the same occupational test urged here by Southwest Marine. That is the same test the Court applied in *Northeast Marine Terminal Co., Inc. v. Caputo*[110] and *P.C. Pfeiffer Co., Inc. v. Ford.*[111] Uniformity and consistency mandate that the same occupational test be applied to demarcate the line between Jones Act and LHWCA coverage.

The Court first employed the occupational test in *Pennsylvania Railroad Co. v. O'Rourke,*[112] which involved an action brought under the FELA before the 1972 Amendments to the LHWCA. In *O'Rourke*, the Court held that a railroad brakeman's FELA action for injuries sustained while releasing a defective hand brake on a freight car aboard a car float in navigable waters was barred.

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[109]*Miles, supra,* 111 S.Ct. at 324.

[110]*Supra,* 432 U.S. 249 (1977).

[111]*Supra,* 444 U.S. 69 (1979).

[112]*Supra,* 344 U.S. 334 (1953).

The Court concluded that the brakeman's exclusive remedy was provided by the LHWCA because he was employed by a maritime employer under the LHWCA, his injury occurred on navigable waters, and he was on navigable waters in furtherance of his employer's business.[113] The same reasoning applies no less to Gizoni.

The Court applied the same approach in *Chesapeake and Ohio Railway Co. v. Schwalb.*[114] In *Schwalb*, a group of railroad employees injured while working on a pier from which coal was being loaded onto ships brought suit under the FELA. They were engaged in machine repair, housekeeping and janitorial duties. The Court, relying on *Caputo*, *Ford*, and *Herb's Welding v. Gray*[115] held that because those employees were performing work essential to the ship loading process, the LHWCA (not the FELA) was their exclusive remedy.

In *Schwalb*, the Court relied on *Herb's Welding v. Gray*,[116] which was not a FELA case. In *Gray*, the Court employed the occupational test to deny LHWCA coverage to a welder working on an offshore oil rig. The Court emphasized that Gray's work was "far removed from traditional LHWCA activities" and that the LHWCA was not meant to cover those employees not engaged in loading, unloading, repairing or building of a vessel merely because they are injured in an area adjoining navigable waters. It follows that the LHWCA was meant to cover those employees, such as Gizoni, who are engaged in loading, unloading, building or repairing a vessel when they are injured on a covered situs.

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[113] *Id.* at 342.

[114] 493 U.S. 40 (1989).

[115] *Supra*, 470 U.S. at 414.

[116] *Id.*

The rationale of *O'Rourke*, *Gray* and *Schwalb* applies to the present case. Such maritime employees are precluded from bringing Jones Act claims against their LHWCA employers. Indeed, the occupational test is consistent with the intent of Congress that the Jones Act and LHWCA be mutually exclusive. Therefore, the decision of the Ninth Circuit, which is in conflict with *O'Rourke*, *Gray* and *Schwalb*, should be reversed.

VI

MARITIME EMPLOYEES IN OCCUPATIONS COVERED BY THE LHWCA ARE PRECLUDED FROM PURSUING JONES ACT CLAIMS IN THE SAME FASHION THAT SUCH EMPLOYEES ARE PRECLUDED FROM PURSUING LHWCA SECTION 5(b) CLAIMS AGAINST THEIR STATUTORY EMPLOYERS AND UNSEAWORTHINESS CLAIMS AGAINST THIRD PERSONS.

The LHWCA contains an exclusive liability provision.[117] Section 5(a) provides that because the LHWCA employer is required to pay compensation and medical benefits regardless of fault to an injured employee, the employee is barred from bringing a tort action against the employer.[118]

Thus, Section 5(a) is a "classic *quid pro quo*, one commonly found in workers' compensation legislation."[119] The injured employee is assured of receiving compensation promptly,

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[117] 33 U.S.C. § 905(a).

[118] *See Bush*, *supra*, 927 F.2d at 445.

[119] *Cf. Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983) (in which the Court described a similar exclusive liability provision contained in the Federal Employees Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq.*)

efficiently, and in an amount sufficient to cover his medical expenses regardless of fault. In return, the LHWCA remedies are the exclusive means of recovery. The right to bring a lawsuit that might ultimately have yielded more in damages if it could be proven the employer was negligent has been extinguished by the LHWCA.[120]

In *Morrison-Knudsen Construction Co. v. Director, OWCP,*[121] the Court emphasized that:

> [T]he [LHWCA] is not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defense to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail.

The Ninth Circuit, however, would allow employees engaged in occupations specifically covered by the LHWCA (such as Gizoni) to obtain the benefits of the LHWCA and then circumvent the exclusive liability provisions of the LHWCA. The LHWCA would constitute a mere stepping stone to a possible jury award. Gizoni would thus enjoy the security of the "no-fault" LHWCA remedy while also attempting to obtain a Jones Act remedy not otherwise available to other land-based LHWCA workers.[122]

Nevertheless, employees covered by the LHWCA have attempted to circumvent its exclusive liability provisions since its

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[120]*See Bush, supra,* 927 F.2d at 445.

[121]461 U.S. 624, 636 (1983).

[122]Bull, *Seaman Status Applied: A Practical Guide To Status Determination,* 1 U.S.F. Maritime Law Journal 43, 115 (1989).

enactment. However, Congress has repeatedly indicated that the LHWCA is the exclusive remedy of LHWCA employees against their statutory employers for injuries on a covered situs.

The first occasion where LHWCA employees were able to circumvent Section 5(a) arose between 1946 and 1972. Beginning in 1946, an injured longshoreman could obtain the benefits of the LHWCA and also sue the owner of the vessel on which he was working and obtain damages for his injuries regardless of fault, based on the doctrine of seaworthiness. That was due to a number of decisions of the Court starting with *Seas Shipping Co. v. Sieracki.*[123] In addition, based on the Court's ruling in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,*[124] shipping companies succeeded in recovering from the stevedore-employers the damages for which the shipping companies were held liable to injured longshoremen.[125]

The end result of the Court's decisions was that despite Section 5(a)'s exclusive liability provision for the LHWCA employer, the stevedore-employer was indirectly liable for damages to an injured longshoreman, its employee, who used the technique of suing the vessel under the seaworthiness doctrine.[126] Prior to the 1972 Amendments, Congress noted that the social costs of those lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services seldom resulted in a real increase in actual benefits for injured workers.[127] The same can

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[123]328 U.S. 85 (1946). *See Caputo, supra,* 432 U.S. at 262, 263, n.18.

[124]350 U.S. 124 (1956).

[125]*Caputo, supra,* 432 U.S. at 262, 263, n.18.

[126]*Id.*

[127]*Id.*

be said of Jones Act lawsuits brought by LHWCA employees against their statutory employers.

Due in part to the intolerable situation whereby LHWCA employees had circumvented the exclusive liability provisions of the LHWCA, Congress enacted the 1972 Amendments. Among other things, those amendments eliminated the longshoremen's strict liability seaworthiness remedy against shipowners and also eliminated shipowners' claims for indemnification against stevedores.[128]

With the 1972 Amendments Congress intended that land-based maritime workers were to be treated as other land-based workers, that only "seamen" were to be treated differently:

> [t]he seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. *The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel . . . [t]he purpose of the amendment is* to place an employee injured aboard a vessel in the same position he would be if injured in non-maritime employment ashore . . . and *not endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called . . . .* [129] [Emphasis Supplied.]

Thus, allowing a land-based shipyard worker such as Gizoni to proceed with a Jones Act claim against his shipyard employer

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[128]*Caputo, supra,* 432 U.S. at 263.

[129]S.Rep. No. 1125, 92nd Cong., 2d Sess., 9-10 (1972); H.R. Rep. No. 1441, 92nd Cong., 2d Sess., 6 (1972).

is simply inconsistent with the rationale for precluding unseaworthiness claims by such land-based maritime workers. Indeed, the Ninth Circuit decision would also allow Gizoni to proceed with his unseaworthiness claim, which clearly conflicts with the 1972 LHWCA Amendments.

Nonetheless, for a short period after the 1972 Amendments, LHWCA employees were still able to circumvent the exclusive liability provisions of the LHWCA. Congress again confirmed with the 1984 Amendments that the LHWCA was to be the statutory employer's exclusive liability to its LHWCA employees for injuries on a covered situs.

Although Section 5(a) bars a shipyard worker from bringing an action against his employer, Section 5(b)[130] expressly allows the injured worker to bring a negligence action against the owner of a vessel upon which he has sustained his injuries.[131] Generally, there is no conflict between Section 5(a) and Section 5(b) because the injured worker's employer is not usually the same entity that owns the vessel.[132]

In some cases, however, shipyard workers are employed directly by vessel owners. Faced with this conflict, the Court held in 1983 in *Jones & Laughlin Steel Corp. v. Pfeifer,*[133] that where the vessel owner operated in a "dual capacity" as both employer and vessel owner, there was an exception to Section 5(a)'s

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[130]33 U.S.C. § 905(b). The right to sue the vessel owner for negligence is based on the vessel owner's duty, under federal maritime law, to maintain the ship in a reasonably safe condition. *Scandia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 163, n.10 (1981).

[131]*Bush, supra,* 927 F.2d at 445.

[132]*Id.*

[133]462 U.S. 523, 528 (1983).

exclusive liability. Thus, the injured worker's Section 5(b) right to tort damages for negligence against the vessel owner prevailed over Section 5(a) even where the vessel owner was also the employer.[134]

However, that loophole didn't survive long. Sixteen months after the Court's decision in *Jones & Laughlin*, Congress amended Section 5(b)[135] to expressly bar suits directly or indirectly by injured shipyard workers against "dual capacity" shipyards.[136] Consequently, Congress again indicated in no uncertain terms that the LHWCA is to be the statutory employer's exclusive liability for injuries of its LHWCA employees on a covered situs.[137]

Section 5(a) clearly provides that the LHWCA is the statutory employer's exclusive liability for work-related injuries to its LHWCA employees on a covered situs. And, Section 5(b) expressly bars negligence lawsuits of LHWCA employees against their statutory employers. The congressional intent behind the 1984 Amendments confirms that Sections 5(a) and 5(b) should also bar other lawsuits, such as Jones Act claims which are also premised on negligence, by LHWCA employees against their statutory employers.

Gizoni is simply attempting to circumvent the exclusive liability provisions of the LHWCA. The Ninth Circuit's mechanical application of prior Supreme Court precedent, without considering the congressional intent expressed by the LHWCA and its amendments, sanctions the mischief Congress has repeatedly sought to avoid.

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[134]*Id.* at 532.

[135]33 U.S.C. § 905(b).

[136]*See Bush, supra*, 927 F.2d at 445.

[137]See Footnote 19.

Such an approach is inconsistent with the congressional intent behind the 1972 and 1984 Amendments to the LHWCA.[138] That congressional intent establishes that the LHWCA, which is liberally construed to provide generous benefits to LHWCA employees, is the statutory employer's exclusive liability for injuries of its LHWCA employees on a covered situs.

> [L]egislation sends . . . signals to which an admiralty court must attend. 'The Legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.' [Citation omitted.] Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits.[139]

The Ninth Circuit has gone beyond the limits prescribed by Congress by allowing land-based maritime employees in occupations specifically enumerated in the LHWCA to pursue Jones Act claims against their statutory employers. Therefore, Southwest Marine urges the Court to hold, consistent with the congressional intent, that a land-based maritime employee engaged in an occupation enumerated in the LHWCA and injured on a covered situs is ineligible to have his "seaman" status determined by a jury in a Jones Act proceeding.

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[138]See Footnotes 19 and 129.

[139]*Miles, supra*, 111 S.Ct. at 321.

VII

WHERE AN EMPLOYEE IS ARGUABLY COVERED BY THE LHWCA, BUT THAT EMPLOYEE'S STATUS CANNOT BE DETERMINED BY THE COURT AS A MATTER OF LAW, THE COURT SHOULD DEFER TO THE EXPERTISE OF THE LHWCA ADMINISTRATIVE AGENCY CHARGED BY CONGRESS WITH THE AUTHORITY FOR DETERMINING LHWCA COVERAGE AND "MEMBER OF A CREW" STATUS.

The District Court held as a matter of law that Gizoni was not a Jones Act seaman. Implicitly, it found that applying the legal standards to the facts, Gizoni had not even presented an arguable case for seaman status, *i.e.*, that based on the facts, reasonable persons applying the proper legal standards could not reach any other conclusion. Thus, the District Court did ". . . not abdicate its duty to determine if there (was) a reasonable basis to support (a) jury's conclusion." Rather, it found as a matter of law there was nothing for a jury to decide. Other cases, however, may not be so clear-cut.

In *Wilander*, the Court observed that "(I)t is odd but true that the key requirement for Jones Act coverage now appears in another statute,"[140] *i.e.*, the Longshore Act in which Congress extended LHWCA coverage to all maritime workers on a covered situs other than "a master or member of a crew" (Jones Act "seaman"). Congress also delegated the authority to decide who is a "member of a crew" (and conversely a Jones Act "seaman") to the expertise of the administrative agency it established by the LHWCA. Thus, it appears even odder that Jones Act seaman status may also be decided by a jury.

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[140]*Supra*, 111 S.Ct. at 813.

In *Wilander*, the Court noted it had held in *South Chicago Coal & Dock Co. v. Bassett*[141] that Congress had given the LHWCA administrative officer the authority to determine who is a "member of a crew" under the LHWCA.[142] "As odd" as it may seem, Congress thus gave the same LHWCA administrative officer the authority to decide who is a "seaman" under the Jones Act because the LHWCA phrase "master or member of a crew" is merely a congressional refinement of the Jones Act term "seaman."[143]

Yet, the decision of the Ninth Circuit permits a Jones Act jury to usurp the authority and expertise of the administrative agency established by Congress to determine such questions.[144] In enacting the LHWCA, Congress sought uniformity, consistency and exclusivity, and it did not intend that employees could obtain conflicting determinations regarding "member of a crew" or "seaman" status in different forums.[145] Moreover, Congress never intended that an employee could either pick and choose which statutory scheme he prefers or recover under both statutes. But, a Jones Act jury trial on the issue of "seaman" status,

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[141]309 U.S. 251 (1940).

[142]*Wilander, supra*, 111 S.Ct. at 818.

[143]*Id.* at 817.

[144]That the LHWCA administrative agency has not made a determination of Gizoni's status under the LHWCA or Jones Act is immaterial, reflecting only that Gizoni elected to bypass the LHWCA administrative agency and proceed directly with his Jones Act suit in district court.

[145]*See Fontenot, supra*, 923 F.2d at 1132-33.

although characterized as a mixed question of law and fact,[146] clearly leads to such mischief.[147]

In *Wilander*, the Court was "not asked" to reconsider the rule that a Jones Act plaintiff was entitled to a jury trial on the issue of "seaman" status.[148] Here, it is. In order to maintain the mutual exclusivity of the two Acts, it is necessary in a Jones Act case, where plaintiff performs work enumerated under the LHWCA on a covered situs but asserts seaman status, for the court to initially determine as a matter of law whether LHWCA coverage exists. If it does, a plaintiff is not entitled to recover under the Jones Act -- nor to a jury trial to determine "seaman" status.[149]

Congress was cognizant of the Jones Act and its shortcomings when it subsequently enacted the LHWCA and its amendments. The LHWCA and its amendments are the last and clearest expressions of congressional intent that Jones Act "seaman" status should be determined by the expertise of the administrative agency Congress created through the LHWCA. In particular, Congress established and authorized the LHWCA administrative agency to determine Longshore coverage (and thus Jones Act coverage) by delegating the authority to administratively decide the mixed questions of fact and law of who is or is not a "master or member of a crew," and thus who is or is not a Jones Act "seaman."[150]

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[146]*Wilander, supra,* 111 S.Ct. at 818.

[147]*Fontenot, supra,* 923 F.2d at 1132.

[148]*Wilander, supra,* 111 S.Ct. at 818.

[149]*Pizzitolo, supra,* 812 F.2d at 982-983; *Williams, supra,* 839 F.2d at 1041; *Fontenot, supra,* 923 F.2d at 1133; *Cf. O'Rourke, supra,* 344 U.S. at 304-306; and *Schwalb, supra,* 493 U.S. at 40.

[150]*See Fontenot, supra,* 923 F.2d at 1132. "While we recognize that there are differences between the fact-finding (continued...)

In order to achieve consistency and preserve mutual exclusivity, it intended to remove the issue of seaman status from a Jones Act jury.

A decision by an LHWCA administrative officer on the mixed question of fact and law is binding on a Jones Act claim if there is sufficient evidence to support it.[151] That is, a final LHWCA decision that an employee is covered by the LHWCA, and therefore is not a "master or member of a crew" or a Jones Act "seaman," precludes a Jones Act suit.[152] Thus, there can be no "seaman" status issue for a jury to decide.[153]

But what if, as in this case, the employer has provided LHWCA benefits without a prior LHWCA administrative determination of LHWCA coverage or "member of a crew" status, and the employee then files a Jones Act suit? Again, as the Court recognized in *Wilander*, Congress intended that Jones Act coverage be determined, not by a jury, but by the LHWCA. That includes the special expertise of the administrative agency to which Congress entrusted the determination of who is a "master or

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[150](...continued)
process in the administrative forum and in the judicial forum, we doubt that the differences are sufficient to deprive an injured employee of a fair opportunity to present the coverage issue before the Department."

[151]*Wilander, supra,* 111 S.Ct. at 818.

[152]*Id.*

[153]*Id.*

member of a crew" and thus "seaman" status.[154] And, if LHWCA coverage exists, Jones Act coverage does not.

Thus, where there has not been a LHWCA determination in a Jones Act case in which the plaintiff is arguably covered by the LHWCA, the court should either determine LHWCA coverage as a matter of law (as the District Court did here) or stay the Jones Act proceeding until the plaintiff has obtained a final LHWCA agency determination that he is a "master or member of a crew," *i.e.*, a Jones Act "seaman."[155]

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[154]Indeed, Southwest Marine urges the Court to apply a test similar to that adopted by the Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), regarding the primary jurisdiction of the NLRB. In *Garmon*, the Court held the National Labor Relations Act ("NLRA") preempts the jurisdiction of courts over conduct which is "arguably" covered by the NLRA. Where there is preemption, the courts simply lack the power to adjudicate claims. The same approach should apply for claims arguably covered by the LHWCA. *See also Intern. Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 389 (1986), quoting from *Garmon*.

[155]LHWCA Section 5(a) is similar to the exclusive remedy provision of 5 U.S.C. § 8116(c) of the Federal Employees Compensation Act ("FECA"). In *Reep v. United States*, 557 F.2d 204 (9th Cir. 1977), the Ninth Circuit addressed the issue of whether a federal employee's claim brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, against the United States, in effect the employer, was barred by FECA. The Ninth Circuit held that an injured federal employee may not bring an action under the FTCA where there is a "substantial question of coverage" under FECA. The employee must first pursue his FECA remedies unless the injuries are clearly not covered under FECA. That same reasoning should apply to Jones Act claims where there is a substantial question of LHWCA coverage.

In sum, Congress specifically entrusted the LHWCA administrative agency with the authority to determine the mixed questions of fact and law involved in determining whether an employee is covered by the LHWCA or by the Jones Act as a "master or member of a crew." Permitting a Jones Act jury to make that determination perpetuates the mischief Congress sought to end. Therefore, if a Jones Act court cannot itself render a determination of LHWCA coverage as a matter of law through summary judgment, it should defer or stay the Jones Act proceeding until there has been a final coverage decision by the LHWCA administrative agency.[156]

VIII

THE DISTRICT COURT APPLIED THE PROPER LEGAL STANDARDS TO THE UNDISPUTED FACTS AND FOUND THAT GIZONI WAS NOT A JONES ACT SEAMAN.

The District Court found that: the floating platforms were not vessels in navigation;[157] Gizoni was not permanently connected

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[156]Such a procedure is consistent with the "no fault" and "agency expertise" concepts implicit in the LHWCA. It is also consistent with congressional intent to achieve consistency and mutual exclusivity while avoiding duplicate coverage and the exploitation of both financial and judicial resources.

[157]The District Court specifically found that the structure and purpose of the floats was to facilitate repair of other vessels. They did not have raked bows, lifeboats, lifesaving equipment, billage pumps, crew quarters or registration required for navigation and were essentially nothing more than platforms or docks upon which riggers stood. J.A. III.

to a vessel;[158] and he was not aboard any floating structure in connection with a vessels's mission. Rather, Gizoni was on the floating platforms to perform ship repair. Therefore, it found as a matter of law that Gizoni was a harbor worker covered by the LHWCA (not a Jones Act seaman).[159] As such, Gizoni was precluded by the exclusive remedy provisions of the LHWCA from bringing a Jones Act suit and from having his alleged Jones Act "seaman" status determined by a jury.[160]

The Ninth Circuit found that Gizoni's "seaman" status, and thus his coverage or noncoverage by the LHWCA, must be submitted to a Jones Act jury.[161] The Ninth Circuit thus failed to recognize (1) that Congress never intended LHWCA coverage to be determined by the decision of a Jones Act jury and (2) that traditional summary judgment is available to determine "seaman" status in an appropriate Jones Act case.[162]

Moreover, this Court recently reemphasized in *Wilander* that where the underlying facts are established, as here, they must be analyzed by the court to determine whether or not, as a matter of law, they meet the proper statutory standard. In other words, where the trial court finds on the facts that a jury could, as a

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[158]*Id.* The District Court specifically concluded that the floating platforms or docks to which Gizoni claimed assignment were not "vessels in navigation" and that Gizoni was only aboard any such platforms to perform his work as a ship repairman. J.A. I.

[159]*Id.*

[160]*Cf. Wilander, supra*, 111 S.Ct. at 818.

[161]J.A. II.

[162]*Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

matter of law, reach only one conclusion, summary judgment or a directed verdict is mandated.[163] This is such a case.

The cases following the Fifth Circuit's decision in *Robison* show that Gizoni is unable to establish facts upon which a Jones Act jury could reasonably find "seaman" status.[164] The Fifth Circuit has found as a matter of law that a shipyard rigger such as Gizoni fails to qualify for seaman status under the analysis set forth in either *Pizzitolo* or *Robison*.[165] Moreover, this Court has indicated that "the key to (Jones Act) seaman status is an employment-related connection to a vessel in navigation. A necessary element of this connection is that the seaman perform the work of the vessel. [Citation omitted.]"[166] Gizoni presented no such facts.

Gizoni was not performing the work of a vessel and he did not have the required employment-related connection to a vessel in navigation. Thus, a Jones Act jury finding that Gizoni is a "seaman", and therefore not covered by the LHWCA, would be inconsistent with the legal standards that were properly applied by the District Court.[167] As the Court suggested in *Wilander*, the District Court merely applied the applicable legal standard to the admitted facts when it found Gizoni was not a Jones Act "seaman."[168]

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[163]*Wilander, supra*, 111 S.Ct. at 818.

[164]*Fazio v. Lykes Bros. S.S. Co., Inc.*, 567 F.2d 301, 303 (5th Cir. 1978); *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42, 46 (5th Cir. 1960).

[165]*Bouvier v. Krenz*, 702 F.2d 89 (5th Cir. 1983).

[166]*Wilander, supra*, 111 S.Ct. at 817.

[167]*Id.*

[168]*Id.* at 818.

Based on the admitted facts presented in this case, a jury could not reasonably find under the proper legal standards that Gizoni was a "member of a crew". Thus, summary judgment was appropriate and Gizoni is not entitled to a jury determination of his alleged seaman status. The decision of the Ninth Circuit should be reversed.

IX

CONCLUSION

Gizoni, a rigger and rigging foreman for Southwest Marine, a ship repair yard, falls squarely within the definition of "ship repairman," an occupation specifically covered by the LHWCA. In addition, Gizoni was injured on a covered situs. As such, he is covered by the LHWCA. As an employee covered by the LHWCA he is not entitled to proceed to a jury trial on the issue of alleged seaman status. A holding to the contrary would violate congressional intent behind the LHWCA and its amendments and place an inappropriate burden on employees and employers that Congress intended to protect from such burdens by the LHWCA.

In the instant case, Gizoni fails to qualify for jury consideration under any test for seaman status because of lack of a vessel in navigation, and lack of a sufficient connection to any vessel. Simply put, Gizoni aided in ship repair work, and not a ship's work or mission. Thus, the District Court properly granted summary judgment. If any doubt existed as to Gizoni's status as a seaman, the Ninth Circuit should have required deferral to the

LHWCA administrative agency in order to avoid inconsistent results, uncertainty, and the burdens sought to be avoided by the LHWCA. The Ninth Circuit decision should be reversed.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?

LIST OF PARTIES

The following are the parties to this proceeding:

Byron Gizoni
Plaintiff-Respondent

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Defendant-Petitioner

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No. 90-584

In The

Supreme Court of the United States

October Term, 1990

SOUTHWEST MARINE, INC.,

Petitioner,

v.

BYRON GIZONI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit[1] reversed and remanded the decision of the United States District Court for the Southern District of California. The District Court had granted the motion of Southwest Marine, Inc. for summary judgment on the ground that Byron Gizoni ("Gizoni") was a ship repairman covered by the Longshore Act[2] rather than a Jones Act seaman.[3]

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[1] 909 F.2d 385 (9th Cir. 1990).

[2] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter "Longshore Act" or "LHWCA".

[3] The Jones Act, 46 U.S.C. § 688(a).

JURISDICTION

Jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. § 688(a).

Sections 902(3), 902(3)(G), 902(4), 903(a), 905(a), and 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

STATEMENT OF THE CASE

Respondent Byron Gizoni was a rigging foreman employed by Southwest Marine, Inc. in San Diego, California. He and the riggers under his supervision manned various barges owned by Southwest Marine, which Southwest Marine insists are "floating platforms", not barges (a distinction which is legally irrelevant).

Nonetheless, plaintiff worked substantially aboard these barges which were used to transport ship parts and ship repair equipment around San Diego Harbor. The barges were moved with tugs between the various piers at Southwest Marine, and from the Southwest Marine yard to the Naval Station at 32nd Street. During these moves plaintiff served as a lookout and gave maneuvering signals to the tugboat operator.

On April 6, 1987, one of the Southwest Marine barges was being used to transport a rudder from the shipyard

to a floating drydock where it was to be reinstalled on a U.S. Navy ship. While walking on the deck of the barge, plaintiff's foot broke through a thin wooden sheet which was covering a hole in the deck. In the fall plaintiff suffered disabling leg and back injuries and is unable to work. Because plaintiff was permanently assigned to the Southwest Marine barges he alleged seaman status and sued his employer pursuant to the Jones Act.

Southwest Marine challenges plaintiff's right to claim seaman status and states that he is a harbor worker who is limited to Longshore Act benefits.

However, Section 2(3)(G) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 903, *excludes* "a master or member of a crew of any vessel." Plaintiff is claiming that he is a member of the crew of the barges. Whether he is in fact a seaman or a harbor worker is a factual issue which must be resolved by a jury.

Petitioner Southwest Marine, Inc. brought a motion for summary judgment claiming there were no triable issues of fact, and the motion was granted.

Basically, Southwest Marine was able to persuade the District Court to rule on factual disputes which belong in front of a jury such as seaman status and vessel status. Plaintiff's opposition papers contested and controverted these assertions. The District Court misstated the legal definitions of seaman and vessel and chose to ignore the facts and factual disputes.

SUMMARY OF ARGUMENT

It is Gizoni's position that, pursuant to numerous Supreme Court decisions, seaman status is a factual issue, which must be resolved by a jury. The Supreme Court has broadened the "aid to navigation" requirement to encompass those who contribute to the mission of the vessel, yet defendant wants to narrow it to those who aid the transportation function of the vessel. The Supreme Court has defined vessels as every description of watercraft or other contrivances capable of being used for transportation on water, yet Southwest Marine seeks to exclude work barges in its shipyard.

Southwest Marine wants the district court judges to usurp the jury's power and exclude everyone from Jones Act coverage who is employed in the ship repair industry, regardless of their roles in the operation of vessels.

ARGUMENT

1. RESPONDENT GIZONI IS NOT A COVERED EMPLOYEE UNDER THE LONGSHORE ACT

The Longshore and Harbor Workers' Compensation Act (known as the "Longshore Act"), 33 U.S.C. Sec. 901 *et seq.*, is very specific in its exclusions. 33 U.S.C. Sec. 902 states:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include –

> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
>
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
>
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraphs (4), and (iii) are not engaged in work normally performed by employees of that employer under this Act;
>
> (E) aquaculture workers;
>
> (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
>
> (G) a master or member of a crew of any vessel; or
>
> (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;
>
> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

It is clear from this exclusionary language that the Longshore Act excludes secretaries employed by shipyards, security guards employed by shipyards, data processors employed by shipyards, ship repairmen working on recreational vessels under sixty-five feet in length;

ship repairmen working on vessels under eighteen tons net, and ship repairmen who are vessel crew members (regardless of who they are employed by).

The language of 33 U.S.C. Sec. 902(3)(G) preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard. There are no qualifiers. Southwest Marine wants 33 U.S.C. Sec. 902(3)(G) to say "a master or member of a crew of any vessel, unless the vessel is owned by a shipyard and the worker is employed by a shipyard." Unfortunately the Longshore Act does not contain the restrictive language that Southwest Marine wants, so they are asking this Court to change the statute. The Court cannot do this. The Longshore Act does not give shipyards immunity from Jones Act lawsuits. Rather than being restrictive in its language on this issue, the Longshore Act excludes from coverage the master or crew member of *"any"* vessel, without regard to the vessel's ownership or the worker's employment.

Over and over Southwest Marine argues the concept of "Congressional intent." If Congress intended that the Longshore Act cover vessel crewmen engaged in ship repair activity, then why didn't they say that in the Longshore Act? Southwest Marine is virtually saying that Congress didn't know what it was doing when it passed the Longshore Act.

The Longshore Act and the Jones Act are mutually exclusive, and the terms "seaman" and "master or member of a crew of a vessel" are equivalent. *McDermott International, Inc. v. Wilander,* 111 S.Ct. 807, 815 (1991).

Southwest Marine says that Gizoni, as a land-based ship repairman employed on a covered situs, is not entitled to proceed to a jury trial for "reconsideration" of Jones Act status. The word "reconsideration" seems terribly inappropriate here since there has never been an original determination of Mr. Gizoni's status. Basically speaking Southwest Marine is asking the Court to ignore the exclusions in the Longshore Act and extend coverage to Mr. Gizoni without any determination of his status by a trier of fact.

2. ACCORDING TO THE SUPREME COURT, SEAMAN STATUS IS AN ISSUE FOR THE JURY, THEREFORE IT IS NOT A PROPER SUBJECT FOR A SUMMARY JUDGMENT OR ADMINISTRATIVE DETERMINATION

Gianfala v. Texas Company, 350 U.S. 879 (1955); *Senko v. Lacrosse Dredging Corporation,* 352 U.S. 370 (1957); *Grimes v. Raymond Concrete Pile Company,* 356 U.S. 252 (1958); *Butler v. Whiteman,* 356 U.S. 271 (1958).

The Supreme Court has consistently held that seaman status is a jury issue.

Courts have upheld summary judgments and directed verdicts denying seaman status where plaintiffs worked on fixed oil drilling platforms but slept on a tender vessel that serviced the rig. *Golden v. Rowan Companies, Inc.,* 778 F.2d 1022 (5th Cir. 1985); and where an anchor handler was hurt on land before any assignment to a vessel, *Ramos v. Delmar Systems, Inc.,* 750 F.2d 389 (5th Cir. 1985); and where a plaintiff performed longshoremen's work by loading chemicals onto vessels serviced

by his employer, *Balfer v. Mayonne Mud and Chemical Co.*, 762 F.2d 432 (5th Cir. 1985). In these cases the plaintiffs were working on land and had no relationship to a vessel. They are not analogous to the facts in the instant case.

A significant Supreme Court case was *Gianfala v. Texas Company*, 350 U.S. 879 (1955), involving a death action of a worker who had been assigned to a submersible drilling barge and who had been killed while helping unload pipes from an adjacent cargo barge. A jury found the worker to be a crew member. The Fifth Circuit reversed, holding that the status issue was a question of law to be resolved by the judge, that the drilling barge was not in navigation, and that the decedent was on board as a member of a drilling crew and not as a member of a ship's crew. The Supreme Court, without explanation, reversed and remanded the case to the district court with instructions to reinstate the judgment.

The next Supreme Court decision on the issue was *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957). The Supreme Court reinstated a state court finding of a seaman status for a handyman on a dredge that had been anchored ashore and used as a stationary earth-moving machine. Senko was a laborer on the dredge who worked an eight-hour shift, ran errands on shore, was paid by the hour, lived at home, drove back and forth each day, and brought his own meals to work. He had no duties connected with moving the dredge and was injured ashore while placing a signal lantern from the dredge in a shack on land. The Court held that "the determination of whether an injured person was a 'member of the crew' is to be left to the finder of fact." *Id.* at 374. Of significance to the Court was testimony regarding Senko's duty "to

maintain the dredge during its anchorage and for its future trips." The Court also found it significant that the plaintiff performed almost all his duties on or on behalf of the dredge and therefore considered him to be "permanently attached to and employed by the dredge as a member of its crew." *Id.* at 372. The Court held this was sufficient evidence to support a jury finding of a crewmember status.

After these decisions, the Supreme Court considered two other cases involving the status issue. *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) involved a pile driver who had helped in completing a "Texas tower," a radar relay installation like a fixed drilling platform. Grimes had lived on the tower and kept its equipment in operating condition while it was being towed out to sea. He had performed strictly piledriving duties after the tower reached its location and was anchored. Several days later, he was injured while returning from a trip from a nearby barge to the tower. The Court of Appeals held that Grimes was not a crew member as a matter of law. The Supreme Court, however, reversed without explanation, citing *Senko*, and *Gianfala*, in holding that there was sufficient evidence to send the status issue to the jury.

The second case, *Butler v. Whiteman*, 356 U.S. 271 (1958), involved a day laborer who had performed odd jobs around his employer's wharf and was killed when he fell off either a barge moored to a wharf or an inoperable tub tied to a barge. The trial court granted the employer's motion for a directed verdict, and the circuit court affirmed, noting that evidence indicated that the tug was not in navigation and the deceased was not a

seaman. The Supreme Court, as in *Grimes*, reversed without explanation and remanded, holding that the status issue was a question for the jury.

The Ninth Circuit has followed the Supreme Court in making seaman status a jury issue in a very significant case known as *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983). Wenzel was a diver employed by Seaward Marine Services. From 1979 to 1982 Seaward had a contract with the U.S. Navy to clean ship hulls. The cleaning process was accomplished by divers going underwater with handheld scrapers and brushes and a submerged cleaning and maintenance platform known as a SCAMP. The SCAMP was a saucer shaped unit 6 feet in diameter and 20 inches deep. It traveled along the ship's hull underwater at 54 feet per minute and could be operated manually by divers. Wenzel, a diver/tender, was assigned to scrape the USS RATHBURNE's underwater sea chest on October 3, 1980, while the SCAMP was *out* of the water. When Wenzel did not surface another diver went underwater and found his body affixed to a sea chest. He had died of asphyxiation. His estate filed a Jones Act claim against Seaward alleging seaman status. Seaward filed a motion for summary judgment arguing that Wenzel was a harbor worker, not a seaman, and the district court granted the motion for summary judgment. The district court's ruling was reversed by the Ninth Circuit, which said that Wenzel's status as a seaman was a close question of fact which had to be determined by the trier of fact.

3. WHETHER GIZONI WAS PERMANENTLY ATTACHED TO A VESSEL OR GROUP OF VESSELS IS A DISPUTED FACTUAL ISSUE WHICH SHOULD GO TO A JURY

The District Court stated that Gizoni was not permanently connected to a vessel. This finding is disputed, and if there is a dispute on this issue, then it is a *factual* dispute which should be resolved by a jury.

In the declaration that Gizoni filed with his opposition to the summary judgment motion he stated:

> "I had worked at Southwest Marine for 3½ years as a rigger and rigging foreman. I worked on the crane barge or the work barges every single day. The third shift riggers, of which I was one, regularly worked on the barges and were responsible for the cleanliness of the barges on a daily basis. I was permanently assigned to the Southwest Marine barges and I worked substantially aboard them. I regularly rode the barges while they were underway within the Southwest Marine yard and also when the barges were towed from Southwest Marine to the Naval Station at 32nd Street. During these moves I handled lines and served as a lookout for the tugboat operator and I gave hand signals to the tugboat operator."

This declaration obviously shows a permanent attachment to the barges. To be a seaman, one need not be attached to one vessel, but to a group of vessels under common ownership and control. This "fleet doctrine" was first discussed in *Norton v. Warner*, 321 U.S. 565, 572 (1944), and further expanded by *Ardoin v. J. Ray McDermont & Co.*, 641 F.2d 277 (5th Cir. 1981); *Robert v. William-McWilliams Co.*, 648 F.2d 255, 261-2 (5th Cir. 1981); and

Waguespark v. Aetna Life & Casualty Co., 795 F.2d 523 (5th Cir. 1986). Since Gizoni was permanently assigned to defendant's barge fleet, he is a seaman.

In *Bullis v. Twentieth Century-Fox Film Corporation*, 474 F.2d 392 (9th Cir. 1973), the Ninth Circuit said on p. 394:

> "The second requirement for seaman status is that there be a more or less permanent connection with the vessel. Significantly the connection may be less permanent, but it cannot be temporary or transitory."

In the instant case, Gizoni's connection to the Southwest Marine barges was hardly temporary or transitory. Working on the barges was a daily part of his job. The Ninth Circuit test in *Bullis* was echoed by the Ninth Circuit in *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (1983). Gizoni worked aboard the Southwest Marine barges everyday. Certainly this is more than a *temporary* or *transitory* connection.

4. THE ISSUE NOW BEFORE THE COURT OF WHETHER EMPLOYEES IN OCCUPATIONS SPECIFICALLY COVERED BY THE LONGSHORE ACT ARE ENTITLED TO HAVE THEIR STATUS AS JONES ACT SEAMAN DETERMINED BY A JURY HAS ALREADY BEEN ADDRESSED BY THE SUPREME COURT

The Outer Continental Shelf Lands Act (OCSLA), 43 USC Sec. 1331, et seq., extends the provisions of the Longshore Act to workers involved in exploring, developing, removing, or transporting natural resources of the outer Continental Shelf. Such workers in these occupations specified by the OCSLA are permitted to bring

Jones Act actions against their employers. This right was described by the U.S. Supreme Court in *Herb's Welding, Inc. v. Gray*, 1985 AMC 1700, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d., note 2 (1985), which says:

> "Offshore oil rigs are of two general sorts: fixed and floating. Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92 Cong., 2d Sess., 393-396, 480-486 (1972), (hereinafter Hearings). Floating structures have been treated as vessels by the lower courts. *E.g. Producers Drilling Co. v. Gray*, 1966 AMC 1260, 1266-67, 361 F.2d 432, 437 (5 Cir. 1966). Workers on them, unlike workers on fixed platforms, see *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 1969 AMC 1082 (1969), enjoy the same remedies as workers on ships. If permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters. See generally Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex.L.Rev. 973, 982-992 (1977). Gray is not in a position to take advantage of this line of cases. All, or almost all, the platforms in the field were fixed production platforms rather than floating rigs. (Tr. of Oral Arg. in No. 77-LHCA-1308, before Benefits Review Board, p.12). There has never been any dispute that Gray was injured on a fixed platform, nor any contention that he should be considered to have been on a vessel at the time of his injury. The only question, therefore is whether Gray is limited to state workers' compensation remedies or may also recover under the LHWCA."

Gizoni is seeking Jones Act seaman benefits in the same manner that an oil worker on a floating platform on

the Outer Continental Shelf would seek Jones Act benefits. Like the Supreme Court says, these people "enjoy the same remedies as workers on ships." Southwest Marine is trying to get the Supreme Court to take a position contra to its position in *Herb's Welding*.

5. SOUTHWEST MARINE'S CONTENTION THAT GIZONI IS PRECLUDED FROM BRINGING THIS ACTION BECAUSE OF THE LONGSHORE ACT IS A MISSTATEMENT OF THE LAW

It is Southwest Marine's position that Gizoni, as a harbor worker, is precluded from bringing this action against his employer by the exclusive remedy provisions of the Longshore Act. This dispute is the crux of the whole case. It is Gizoni's contention that he would only be bound by the exclusive remedy provision of the Longshore Act if he were found to be a harbor worker by the trier of fact – and this is something which has never occurred.

Sec. 2(3)(G) of the Longshore Act [33 U.S.C. 092(2)(G)] excludes from coverage "a master or member of crew of any vessel." Therefore, if a jury found Gizoni to be a seaman, he would be ineligible for Longshore Act benefits.

The District Court stated in its decision that Gizoni was not aboard vessels to aid in navigation but rather to "perform work as a ship repairman." This statement is very misleading. Gizoni never repaired his employer's barges – he worked on them to transport parts and do rigging operations that were essential to the loading and unloading of parts that had to be transported. He used

the barges to repair *other* vessels, just as Mr. Wenzel used the scamp to repair Navy ships in *Estate of Wenzel v. Seaward Marine Services, Inc.*, 708 F.2d 1326 (9th Cir. 1983), wherein the Court ruled that Wenzel's seaman status was a jury issue. The District Court's finding in Gizoni is inconsistent with *Wenzel*.

All of Southwest Marine's arguments are based on the unwarranted assumption that Gizoni is a harbor worker covered by the Longshore Act. He contends that he is not and no trier of fact has determined otherwise.

Obviously the exclusive remedy doctrine of the Longshore Act, 33 U.S.C. Sec. 905(b) only applies to workers covered by the Longshore Act. Sec. 905(b) states:

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. *If such person was employed to provide ship building, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the*

> *employees of the employer*. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act."
>
> (Italicized portions amended in 1984).

This section deals with *third party* negligence actions against vessel owners. Prior to the 1984 amendments all employees *covered* by the Longshore Act could file third party negligence actions against their employers if their employers were the vessel owner and were negligent in their capacity as vessel owner. See *Edmonds v. Compagnie Generale Transatlanlique*, 443 U.S. 256, 61 L.Ed.2d 521, 99 S.Ct. 2753 (1979); *Napoli v. (Transpacific Carriers Corp. & Universal Cargo Carriers, Inc.) Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); and *Allied Towing Corp. v. Tatens*, 580 F. 2d 702 (4th Cir. 1978) (ship repairman case). In 1984 the Longshore Act was amended and shipyard workers covered by the Act lost the right to file third party negligence actions against their vessel owning employers. This has *nothing* to do with seaman status or the Jones Act. Southwest Marine is trying to extend this immunity against third party vessel owner lawsuits by shipyard workers covered by the Longshore Act to Jones Act lawsuits against shipyards that own vessels by seaman employees who are excluded from the Longshore Act. Southwest Marine is trying to fool the courts into thinking that Sec. 905(b) of the Longshore Act cancels out Sec. 902(3)(G) of the Longshore Act. It doesn't. Sec. 905(b) only applies, by its own language, to employees *covered* by the Longshore Act. Sec. 902(3)(G) talks about employees *excluded* from

the Longshore Act. Obviously the immunities in Sec. 905(b) do not apply to employees excluded by Sec. 902(3)(G). Southwest Marine has gone to great lengths to blur these distinctions in paragraph VI of its argument.

Gizoni's right to pursue a Jones Act claim is not affected by his receipt of Longshore Act benefits. See *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed. 2d 368 (1962); *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948), cert. den., 333 U.S. 876, 68 S.Ct. 905, 92 L.Ed. 1152; *Lawrence v. Norfolk Dredging Co. Inc.*, 194 F. Supp 484 (ED Va 1961); and *Massey v. Williams-McWilliams*, 414 F.2d 675 (5th Cir. 1969).

Southwest Marine's comparison of the Longshore Act to the Federal Employees Compensation Act (5 U.S.C. Sec. 8101 *et seq.*) is unwarranted because the exclusions section of FECA does not exclude vessel crew members.

6. THE EXCLUSIVE REMEDY PROVISION OF THE LONGSHORE ACT WAS NEVER INTENDED TO DENY SEAMAN STATUS TO SHIPYARD WORKERS WHO OPERATED VESSELS OWNED BY THEIR EMPLOYERS

Section 5 of the *Longshore Desk Book*, 1986, published by the U.S. Dept. of Labor, states:

> "The Amendments increase protection for shipbuilding employers (who might be considered temporary vessel owners) by preventing claimants who provide shipbuilding, repairing, or breaking services from employing the dual capacity doctrine and providing that such claimants may not maintain a suit against their employer or any employees of the employer."

This immunity was designed to protect shipyards from claims by their employees regarding accidents on vessels that were in the shipyard for repair where the shipyard was arguably the "owner pro hoc vice." The shipyard is also immune from suits by its own employees for accidents involving new construction vessels undergoing seatrials because such vessels are not "vessels in navigation," *Reynolds v. Ingalls Shipbuilding Division*, 788 F. 2d 264 (5th Cir. 1986).

It is understandable that Congress would want to insulate shipyards from seaman type claims from its employees regarding an employer's relationship with a vessel under construction or a vessel undergoing repairs.

However, it is quite another story when one considers vessels owned outright by a shipyard and operated by a shipyard.

What Southwest Marine is basically saying is that those who work on tugs, barges, and floating cranes owned by a shipyard are not seamen. Obviously those who work on such vessels owned by tugboat companies are seamen.

Southwest Marine is asking the Court to make an artificial distinction between those who work on tugs, barges, and floating cranes owned by a shipyard, and those who work on tugs, barges, and floating cranes owned by a non-shipyard.

Southwest Marine seeks to have seaman status determined by *who* owns the vessel rather than by traditional maritime concepts.

Some shipyards in San Diego contract out for tug, barge, and floating crane services. Other shipyards in San Diego happen to own tugs (National Steel Shipbuilding Co., "MR. ED;" Campbell Industries shipyard, the "GUPPY"), barges, and floating cranes. Does ownership of these vessels by a shipyard destroy their crewmembers' status as seamen?

Suppose a shipyard in San Diego also owns shipyards in Los Angeles and San Francisco, and uses its own tugs and barges to move ship parts between the three ports. Should the workers that crew these tugs and barges be denied seaman status because the vessels are owned by a shipyard?

In the instant case Southwest Marine's workers regularly moved ship parts between the various piers and ships at Southwest Marine, and from Southwest Marine to the 32nd Street Naval Station. Are these people any less seamen than those who would move ship parts from one port to another?

In San Diego NASSCO, Campbell Industries shipyard, and Southwest Marine all own tugboats and these tugboats are used to move barges. Should those who work on the tugs be deemed seamen and those who work on the barges be deemed non-seamen?

In the instant case, a tugboat was always used with the work barges and crane barges that plaintiff labored on.

Can the Court envision a situation where a tug is towing a barge down the Mississippi River and those on the tug are seamen and those on the barge are not?

Tugs and barges work hand in hand. If seaman status is going to be denied to those who work on shipyard barges, then it should be denied to those who work on the shipyard tugs that move those barges. If Southwest Marine's argument is to be accepted, then seaman status would have to be denied to tugboat crews on tugboats owned by shipyards.

There is no language in the Jones Act that would deny seaman status to a crewmember of a vessel owned by a shipyard. There are no Supreme Court or Ninth Circuit decisions that deny seaman status to the crewmember of a vessel because the vessel is owned by a shipyard.

7. CONCLUSION

In its conclusion, Southwest Marine states that Gizoni was a "ship repairman." Gizoni agrees 100% with Southwest Marine on this issue – he was a ship repairman and is willing to so stipulate. Southwest Marine then goes on to say that "ship repairman" is "an occupation specifically covered by the LHWCA." NOT TRUE. Many, many ship repairmen are excluded from coverage under the Longshore Act. Read 33 U.S.C. Sec. 902(3)(B); Sec. 902(3)(F); Sec. 902(3)(G); and Sec.902(3)(H). These sections of the Longshore Act specifically *deny* Longshore Act coverage to ship repairmen on floating ship restaurants; ship repairmen on recreational vessels under sixty-five feet; ship repairmen who are vessel crew members or masters; and ship repairmen on vessels under eighteen tons net. *Lots* of ship repairmen are excluded from the Longshore Act., and Gizoni is one of them. Marine tank

cleaners use barges to pump bilge waste from ships; divers use underwater vessels to clean ship hulls; shipyard riggers use barges to remove, install, and transport ship parts. Many shipyards own their own tugboats, including Southwest Marine (their tugboat is called the "SWMER"). Many vessels are utilized in the repair of ships. To deny seaman status (or jury trials) to crew members on vessels utilized in the ship repair industry would be to defy the statutory language of the Jones Act and the Longshore Act.

The term "land-based maritime worker" just injects a higher level of vagueness into these legal arguments. It is a very misleading term. Obviously many tugboat crewmen, barge crewmen, fishing boat crewmen, and ferry boat crewmen sleep at home and spend each workday on their vessel. The legal definition of "seaman" is not limited to those who live on their vessels.

What does Southwest Marine really want out of this case? In 1987 there was a well publicized crane accident at National Steel & Shipbuilding Company (NASSCO) in San Diego in which six men were killed and six injured. They were being lifted in a manbasket from a barracks barge by a pier crane which dropped the manbasket onto the deck of the USS SACRAMENTO. The barracks barge had just been moved from the floating dry dock to the USS SACRAMENTO by a combination of tugboats owned by NASSCO and PacTow, a commercial towing company. How would Southwest Marine like these tugboat crews handled? Would the crews of the NASSCO tugboats fall under the Longshore Act and the crews of the PacTow tugboats fall under the Jones Act? Or would both the

NASSCO and PacTow tugboat crews fall under the Longshore Act because they were all engaged in ship repair work? Interesting expansion of Longshore Act coverage, isn't it? Hardly one that Congress could have intended or foreseen. Talk about mischief – Southwest Marine is the one who is up to mischief here.

Southwest Marine alludes to Congressional subcommittee testimony given by representatives of the Shipbuilders Council in 1981 when the Longshore Act was being amended. None of that testimony dealt with Jones Act immunity. The 1984 Amendments to the Longshore Act gave shipyards immunity from third party negligence actions by their covered employees, but did not give them immunity from Jones Act claims by their employees.

If the shipyards are seeking such an immunity, they need to address that concern to Congress. The Supreme Court has no power to rewrite the Longshore Act. The Ninth Circuit's decision should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC., PETITIONER

v.

BYRON GIZONI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a maritime employee whose occupation is one of those enumerated in the Longshore and Harbor Workers' Compensation Act may be a seaman within the meaning of the Jones Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-584

SOUTHWEST MARINE, INC., PETITIONER

v.

BYRON GIZONI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Secretary of Labor administers the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901-950. See 33 U.S.C. 939. The Secretary has delegated her responsibilities under the LHWCA to the Director of the Office of Workers' Compensation Programs (OWCP), who administers the Act pursuant to regulations codified at 20 C.F.R. Pts. 701-704. The Director is a party to and may participate in any proceedings under the LHWCA.

This case presents the question whether an employee whose occupation is one of those enumerated in Section 2(3) of the LHWCA, 33 U.S.C. 902(3), may nevertheless be a "master or member of a crew

of any vessel" eligible for a remedy under the Jones Act, 46 U.S.C. App. 688, rather than under the LHWCA. Resolution of this issue will affect federal policy concerning the scope of the LHWCA, as well as administration of the Act by the Secretary of Labor. The United States therefore has a substantial interest in this case.

STATEMENT

1. The LHWCA is a workers' compensation statute that applies to certain employees injured in the course of maritime employment "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. 903(a). Section 2(3) of the LHWCA defines an "employee" covered by the Act as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, *but such term does not include* * * * *a master or member of a crew of any vessel.*

33 U.S.C. 902(3) (emphasis added). An employer's liability under the LHWCA is "exclusive and in place of all other liability of such employer to the employee * * * at law or in admiralty." 33 U.S.C. 905(a).

This Court recently concluded that a "master or member of a crew of any vessel" within the meaning of the LHWCA is the equivalent of a "seaman" under the Jones Act. See *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 813-814 (1991). The Jones Act, in turn, provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury." 46 U.S.C. App. 688.

2. Petitioner Southwest Marine, Inc., operates a ship repair facility in San Diego. Petitioner owns several structures that are used in ship repair and that the court of appeals characterized as "floating platforms."[1] Pet. App. II-2. These floating platforms are used to carry "equipment, materials, supplies, and vessel components around the shipyard and on to and off of vessels being repaired." *Ibid.* They have no motive power or navigational aids of their own, but are moved into place by tugs. Once secured alongside a vessel, the platforms support ship repairmen engaged in their work. *Ibid.*

Petitioner employed respondent as a rigging foreman. Respondent rode the floating platforms as they were towed into place and performed his work while on board. Respondent sometimes "served as a lookout and gave maneuvering signals to the tugboat operator" when the platforms were moved. Pet. App. II-2. He also received lines from the ships' crews to secure the platforms to the vessels being repaired. He alleges that he was injured when his foot broke through a piece of wood covering a hole in the deck of a floating platform as it was transporting a rudder from the shipyard to a floating drydock. *Id.* at II-2 to II-3.

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[1] Respondent characterizes these structures as "barges." Br. in Opp. 6. The district court characterized them as "floating platforms," Pet. App. I-2, and as "barge floats," *id.* at III-9. Petitioner itself has referred to one of the structures as a "pontoon barge." J.A. V-2.

Respondent submitted a claim for and received benefits from petitioner under the LHWCA.[2] He later filed this action against petitioner under the Jones Act, alleging that he was a seaman injured as a result of his employer's negligence. Pet. App. II-3. Respondent also asserted claims for unseaworthiness and maintenance and cure. J.A. IV-4 to IV-5. Respondent alleged that petitioner owned and operated "a group of vessels including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge in navigable waters." J.A. IV-3. He further alleged that, as a rigging foreman, he was "permanently assigned to said group of vessels," and thus was a Jones Act seaman. *Ibid.*

The district court granted petitioner's motion for summary judgment. Pet. App. I-1 to I-2. The court held that petitioner's floating platforms were not vessels in navigation to which respondent was permanently attached, and that respondent was not aboard primarily for the purpose of navigation. *Ibid.*; *id.* at

[2] The LHWCA provides for two methods of receiving compensation. The employer must pay benefits "periodically, promptly and directly * * * without an award" unless it controverts its liability for such compensation. 33 U.S.C. 914(a). See also 20 C.F.R. 702.211, 702.231. If the employer controverts the employee's right to compensation, the deputy commissioner must take action to "protect the rights of all parties." 33 U.S.C. 914(d). The deputy commissioner may dispose of the case informally, see 20 C.F.R. 701.301(7), 702.311-315, or by issuing a formal compensation order with the consent of the parties, 20 C.F.R. 702.315. In cases that require an evidentiary hearing, see 33 U.S.C. 914(h); 20 C.F.R. 702.316, 702.351, an administrative law judge issues a final decision and order. 20 C.F.R. 702.348. In this case, petitioner voluntarily paid respondent benefits under the LHWCA. Consequently, there was no compensation order or adjudication of respondent's entitlement to benefits under the LHWCA.

III-8 to III-9. In addition, the district court concluded that "plaintiff, as a harbor worker, is precluded from bringing this action by the exclusive remedy provisions of the [LHWCA]." *Id.* at I-2.

3. The court of appeals reversed. Pet. App. II. It observed that "[w]hether a claimant is a seaman is typically a question for the jury, where there is an evidentiary basis for such a finding." *Id.* at II-3. In this case, the court found there was a sufficient basis for allowing a jury to determine whether respondent was a seaman. The court relied on its prior decision in *Estate of Wenzel* v. *Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983), which concerned a diver who worked aboard a submerged cleaning and maintenance platform. The court of appeals concluded that this case, like *Wenzel*, presents "close questions of fact which should have been determined by the jury." Pet. App. II-4. In particular, the court said, respondent was entitled to have a jury decide whether the floating platforms are vessels, whether respondent had a permanent relationship to the platforms, and whether he aided in their navigation. *Ibid.*

The court of appeals rejected the district court's holding that, as a matter of law, respondent was covered by the LHWCA rather than the Jones Act. The court recognized that the LHWCA, where it applies, is the employee's exclusive remedy for an injury in the course of maritime employment. Pet. App. II-5 (citing 33 U.S.C. 905(a)). But, the court observed, "by its terms, the LHWCA does not cover 'a master or member of a crew of any vessel,'" which is "the equivalent of 'seaman' in the Jones Act." Pet. App. II-6. Consequently, the court of appeals reasoned that "[w]hether an employee is covered by the

LHWCA or the Jones Act should be determined by looking to the nature of the claimant's work and the intent of Congress in enacting these compensation[] schemes, not by looking to the claimant's job title." 909 F.2d at 389.[3] Accordingly, the court held that respondent's status as a ship repairman, one of the occupations enumerated in Section 2(3) of the LHWCA, 33 U.S.C. 902(3), did not preclude him from seeking damages under the Jones Act. Pet. App. II-6.

SUMMARY OF ARGUMENT

Section 2(3) of the LHWCA, which defines the class of employees covered by that Act, expressly excludes from coverage "a master or a member of a crew of any vessel." 33 U.S.C. 902(3)(G). This Court recently concluded that a "master or member of a crew of any vessel" is the equivalent of a Jones Act seaman. *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807 (1991). *Wilander* held, moreover, that "[i]t is not the employee's particular job that is determinative [of seaman status], but the employee's connection to a vessel." *Id.* at 817. Because a ship repairman may spend all or most of his working hours aboard a vessel (including a special-purpose vessel used exclusively in ship repair), in furtherance of that vessel's mission, such a worker may qualify as a Jones Act seaman.

Petitioner's contention that ship repairmen, shipbuilders, and ship breakers should be conclusively presumed not to be Jones Act seamen ignores the LHWCA's express language excluding from coverage a "master or member of a crew of any vessel." And because Congress's enumeration of certain occupa-

[3] This sentence is misquoted at Pet. App. II-6.

tional categories was not intended to be exhaustive, petitioners' approach would draw an irrational distinction between those in the enumerated categories (longshoremen, ship repairmen, shipbuilders, and ship-breakers) and other maritime employees. Petitioner incorrectly relies on cases holding that certain injured railroad workers who would otherwise have a remedy under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, are instead covered by the exclusive remedial provisions of the LHWCA. These cases are readily distinguishable because the LHWCA contains no express exclusion for railroad workers comparable to the exclusion of Section 2(3)(G) for crew members.

The legislative history confirms that Congress did not intend to deprive seamen of their traditional remedies for personal injury. The original LHWCA, which applied only to longshore and harbor workers injured on navigable waters, expressly excluded from its coverage a "master or member of the crew of any vessel." When the 1972 amendments to the LHWCA extended coverage to certain maritime workers injured on land, Congress limited the categories of land-based employees covered by the LHWCA by specifying that they must be engaged in maritime employment. But in extending the LHWCA to certain additional categories of land-based workers, Congress did not intend to deprive sea-based workers of their traditional seamen's remedy under the Jones Act.

Petitioner's policy-based arguments cannot alter the LHWCA's plain language. Moreover, petitioner is wrong in suggesting that an injured worker may receive a "double recovery" under both the LHWCA and the Jones Act. It is well settled that any compensation received under the LHWCA will be credited

against a subsequent Jones Act award, and any amounts paid to an employee pursuant to the Jones Act must be credited against any subsequent liability imposed under the LHWCA. Because employees cannot receive a double recovery, it is not clear why employers should be required to pay double insurance premiums. The Court rejected a similar "double insurance" argument in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 725 (1980).

Nor is petitioner or its amicus correct in arguing that an employee should be precluded from pursuing a claim under the Jones Act simply because he has also filed a claim under the LHWCA. Under established principles of issue preclusion, only if the question is actually litigated, and it is *adjudicated* that an employee is not a member of a crew of any vessel, is relitigation of that issue barred in an action under the Jones Act.

Petitioner's novel suggestion that the Department of Labor should exercise primary jurisdiction over the question whether a maritime employee is a seaman is outside the scope of the question presented for review and, in any event, is without merit. Petitioner's reliance, in support of this suggestion, on the exclusive remedy provision of the Federal Employees Compensation Act (FECA), 5 U.S.C. 8116(c), is completely misplaced. The courts defer to the Secretary of Labor to determine whether an employee is covered under FECA because that statute, unlike the LHWCA, confers on the Secretary exclusive and unreviewable authority to decide coverage questions.

ARGUMENT

I. JONES ACT SEAMEN ARE EXPRESSLY EXCLUDED FROM COVERAGE UNDER THE LHWCA

A. The LHWCA's Definition of "Employee," as Construed in *Wilander*, Excludes Jones Act Seamen

By its terms, the LHWCA applies to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker," but *not* to "a master or member of a crew of any vessel." 33 U.S.C. 902(3). Congress could not have stated more clearly that "a master or a member of a crew of any vessel" is not within the scope of the LHWCA.

In *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807 (1991), this Court recognized that a "master or member of a crew of any vessel" under the LHWCA is equivalent to a Jones Act seaman. The Court observed that

> "master or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

111 S. Ct. at 813. The Court added that " 'master or member of a crew' restates who a 'seaman' under the Jones Act is supposed to be: a sea-based maritime employee." *Id.* at 814.

In *Wilander*, the Court concluded that "the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a

vessel in navigation." 111 S. Ct. at 817. Accordingly, the Court held that "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Ibid.* The Court viewed this rule as consistent with "Congress' land-based/sea-based distinction" between the LHWCA and the Jones Act. *Ibid.* Because the Jones Act was intended to address "the special hazards and disadvantages to which they who go down to the sea in ships are subjected," *ibid.* (quoting *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)), the Court said that "it is not the employee's particular job that is determinative, but the employee's connection to a vessel."[4] 111 S. Ct. at 817.

Thus, the plain language of the LHWCA excludes from its coverage any "master or member of a crew of any vessel"—*i.e.*, any Jones Act seaman. As the Court observed in *Wilander*, "[t]here is no indication in the Jones Act, the LHWCA, or elsewhere, that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea, but who do not aid in navigation." 111 S. Ct. at 817. Accordingly, if respondent has the requisite connection to a vessel in navigation, he is entitled to

[4] *Wilander* generally approved the Fifth Circuit's test for determining seaman status, which focuses on whether an employee was "assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport but designed to float on water)" and whether the employee "contributed to the function of the vessel or the accomplishment of its mission." *Offshore Co.* v. *Robison*, 266 F.2d 769, 779 (1959) (Wisdom, J.); see also *Barrett* v. *Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1073 (1986) (en banc).

the remedies available to seamen rather than the benefits provided by the LHWCA.[5]

[5] Petitioner (Pet. Br. 45-48) and its amicus (Shipbuilders Council Br. 17-20) contend that, as a matter of law, respondent lacked sufficient connection to a vessel in navigation to qualify for seaman status. This contention is not within the question on which the Court granted certiorari. See Sup. Ct. R. 24.1(a). In any event, we believe that the question whether respondent's special-purpose structures may be "vessels" is properly one to be determined as a question of fact. The courts of appeals have held that a "vessel" can be virtually any structure that has as its purpose and business, to some reasonable degree, "the transportation of passengers, cargo, or equipment from place to place across navigable waters." *Johnson* v. *John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984) (quoting *Bennett* v. *Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975), cert. denied, 469 U.S. 1211 (1985)). See also *Cook* v. *Belden Concrete Prods., Inc.*, 472 F.2d 999, 1001 (5th Cir.), cert. denied, 414 U.S. 868 (1973); *Producers Drilling Co.* v. *Gray*, 361 F.2d 432, 437 (5th Cir. 1966). In addition, this Court has generally taken an expansive view of what constitutes a "vessel." See *Norton* v. *Warner Co.*, 321 U.S. 565, 571 (1944); *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370, 372 (1957); *Gianfala* v. *Texas Co.*, 350 U.S. 879, rev'g 222 F.2d 382 (5th Cir. 1955); *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 416 n.2 (1985). See also 1 U.S.C. 3.

Similarly, the question whether respondent had the requisite connection to vessels in navigation is, in our view, one to be determined by the trier of fact. Respondent alleged that he was "permanently assigned" to a "group of vessels" J.A. IV-3. A seaman need not have an invariable connection to a single vessel. *Ardoin* v. *J. Ray McDermott & Co.*, 641 F.2d 277, 281 (5th Cir. 1981) (collecting cases). And contrary to the suggestion of the Shipbuilders Council (Br. 17), seaman status has never turned on whether the employee sleeps aboard the vessel. See, *e.g.*, *Senko*, 352 U.S. at 372; *Gianfala*, 350 U.S. 879; *Ardoin*, 641 F.2d at 282 ("[M]erely sleeping and eating aboard a support vessel while working on a fixed platform does not make one a seaman * * *. Nor does a failure to do so deprive one of seaman's status.").

B. Petitioner's Exclusive Focus on Job Title Conflicts With The Language of the LHWCA

Petitioner asserts (Pet. Br. 15-25) that respondent was a "land-based employee" covered by the LHWCA as a matter of law because his occupation was one of those enumerated in Section 2(3) of that Act. In support of this position, petitioner relies on *Pizzitolo* v. *Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988). In *Pizzitolo*, the Fifth Circuit said that maritime workers whose occupations are enumerated in Section 902(3) are "unqualifiedly covered by the LHWCA and therefore ineligible for benefits under the Jones Act." 812 F.2d at 982. *Pizzitolo* has not been followed by other circuits, and appears to be a doubtful precedent even within the Fifth Circuit.[6] Because *Pizzitolo*'s approach is contrary to the language of the LHWCA, it should be rejected.

In addition to limiting coverage to injuries that occur on navigable waters or certain areas adjoining navigable waters (the "situs test"), the LHWCA establishes a "status test" to determine coverage under the Act. To pass the "status test," a covered employee must be (1) engaged in "maritime employ-

[6] In a subsequent case, the Fifth Circuit granted rehearing en banc to address the tension between *Robison* and *Pizzitolo*, but the parties subsequently settled the case. *Legros* v. *Panther Services Group, Inc.*, 863 F.2d 345 (1988), reh'g en banc granted, 863 F.2d 355, appeal dismissed, 874 F.2d 954 (1989). See *Chauvin* v. *Sanford Offshore Salvage, Inc.*, 868 F.2d 735, 739 n.14 (5th Cir. 1989). In addition, the Fifth Circuit has tended to analyze cases under both *Robison* and *Pizzitolo* in order to verify that the outcome is the same under both approaches. See, *e.g.*, *Leonard* v. *Dixie Well Service & Supply, Inc.*, 828 F.2d 291 (1987); *Thibodeaux* v. *Torch, Inc.*, 858 F.2d 1048, 1050 (1988).

ment, including * * * [but not limited to] a ship repairman, shipbuilder, and ship-breaker," 33 U.S.C. 902(3), *and* (2) not fall within any of the exclusions of Section 2(3)(A)-(H), including the exclusion for a "master or member of a crew of any vessel," 33 U.S.C. 902(3)(G). Only employees who satisfy *both* parts of the status test are covered by the LHWCA.[7]

Petitioner's contention is flawed for an additional reason. The enumeration of occupations in Section 902(3) is not exhaustive. See *Chesapeake & Ohio Ry.* v. *Schwalb*, 110 S. Ct. 381, 384 (1989); *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985). Thus, petitioner's argument, which would apply a conclusive presumption of LHWCA coverage to ship repairmen, shipbuilders, and ship-breakers, would draw an irrational distinction between workers in those occupations and other land-based maritime workers. There is no indication that Congress intended to draw any such distinction.

Of course, a ship repairman may lack the requisite connection to a vessel in navigation to qualify for seaman status. See *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 80-81 (1979) (noting that "30%-35% of ship repair work is done on land"). The mere fact that a ship repairman performs some of his work on water does not make him a seaman, but a ship repairman *may* spend all or most of his working hours aboard a vessel (or vessels), in furtherance

[7] Petitioner does not suggest that the other express exclusions of Section 2(3)—such as the exclusion for "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet," 33 U.S.C. 902(3)(B), or for "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length," 33 U.S.C. 902(3)(F) should be so ignored.

of the vessel's mission. In such circumstances, the employee may meet the test for seaman status, since that test turns on employees' work-related connection to a vessel in navigation, "regardless of the particular job they perform." See *Wilander*, 111 S. Ct. at 817. Consequently, job title alone cannot determine whether an employee is a seaman covered by the Jones Act or a harbor-worker covered by the LHWCA.[8]

C. The FELA Cases Do Not Support Petitioner's Position

Petitioner contends (Pet. Br. 31-33) that the court of appeals' decision in this case conflicts with decisions holding that the LHWCA provides the exclusive remedy for certain injured railroad workers who would otherwise be covered by the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* See *Chesapeake & Ohio Ry.* v. *Schwalb*, 110 S. Ct. 381 (1989); *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334 (1953). Petitioner's reliance on these cases is misplaced. The LHWCA applies to certain railroad

[8] Courts look to actual job content rather than job title under other remedial statutes designed to protect workers. See, *e.g.*, *Brennan* v. *Western Union Tel. Co.*, 561 F.2d 477 (3d Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*); *Hodgson* v. *The Klages Coal & Ice Co.*, 435 F.2d 377 (6th Cir.) (same), cert. denied, 412 U.S. 973 (1970); *Forsberg* v. *Pacific N.W. Bell Tel. Co.*, 840 F.2d 1409 (9th Cir. 1988) (Equal Pay Act of 1963, 29 U.S.C. 206(d)); *Epstein* v. *Secretary, United States Dep't of Treasury*, 739 F.2d 274 (7th Cir. 1984) (same); *Fountain* v. *Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991) (Age Discrimination in Employment Act of 1967, 29 U.S.C. 621). An exclusive focus on job title would allow employers to affect coverage determinations by manipulating job titles.

workers (and therefore provides their exclusive remedy) because the LHWCA contains no exclusion for railroad workers comparable to the exclusion of Section 2(3)(G) for Jones Act seamen. Indeed, the FELA analogy demonstrates that petitioner's position cannot be squared with the language of the LHWCA. Petitioner would treat Jones Act seamen, who are expressly excluded from the LHWCA's definition of "employee," in the same manner as railroad workers, who are not so excluded. That result can be reached only by ignoring the language of the LHWCA.[9]

II. NEITHER THE LEGISLATIVE HISTORY OF THE LHWCA, NOR THIS COURT'S PRIOR DECISIONS, SUGGEST THAT CONGRESS INTENDED TO DISPLACE THE TRADITIONAL REMEDIES AVAILABLE TO SEAMEN

A. The Legislative History Confirms That Congress Did Not Intend to Deprive Seamen of Their Traditional Remedies for Personal Injury

The legislative history of the LHWCA provides no support for petitioner's assertion (Pet. Br. 24) that Congress intended "to sweep employees in occupations enumerated in the LHWCA within the exclusive coverage of the LHWCA." Instead, the legislative history confirms that Congress intended to exclude seamen from coverage under the LHWCA. In 1972, Congress extended the LHWCA to injuries that

[9] Contrary to petitioner's assertion (Pet. Br. 5), Section 5(a) of the LHWCA (the "exclusivity provision") does not itself provide that all maritime employees engaged in enumerated occupations are covered by the LHWCA. Section 5(a) provides only that, where the LHWCA applies, it is exclusive; it says nothing about the scope of the LHWCA.

occur on land adjacent to navigable waters. That expansion of remedies was not intended to deprive seamen of their traditional remedies under the Jones Act and general maritime law.

1. *The Original LHWCA Did Not Apply to Seamen*

In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court held that the States could not constitutionally extend their workers' compensation systems to longshore workers injured on navigable waters. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-257 (1977); *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 117-118 (1962). Following *Jensen*, "[t]he line of demarcation between land and water became known as the *Jensen* line." *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 306 (1983). Congress enacted the LHWCA in 1927 to fill the gap in workers' compensation coverage that resulted from *Jensen*. *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 72 (1979). The original Act excepted from its coverage a "master or member of a crew of any vessel," ch. 509, § 2(3), 44 Stat. 1425, because representatives of maritime employees successfully argued that the Jones Act and other traditional admiralty remedies generally provide superior relief. See *Boatel, Inc.* v. *Delamore*, 379 F.2d 850, 856 (5th Cir. 1967) (citing *Norton* v. *Warner Co.*, 321 U.S. 565 (1944)). This Court has recognized a duty "not [to] permit the exception to be narrowed whether by administrative construction or otherwise." *Id.* at 571.

2. *The 1972 Amendments to the LHWCA Did Not Restrict the Remedies Available to Seamen*

The original LHWCA "stopped at the water's edge." *Caputo*, 432 U.S. at 259. With the advent of modern containerized shipping, however, longshoring functions traditionally performed aboard ship came to be

performed on land. *Ford*, 444 U.S. at 74. Once again, therefore, coverage under the LHWCA depended on which side of the *Jensen* line a longshore worker's injury occurred. In *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969), this Court noted the advantages of a uniform system of compensation benefits for longshore workers on both sides of the *Jensen* line, but said that the "invitation to move that line landward must be addressed to Congress, not to this Court." *Id.* at 224.

In 1972, Congress accepted the invitation by enacting amendments to the LHWCA. "Whereas prior to 1972 the Act reached only accidents occurring on navigable waters, the amended 33 U.S.C. § 903 expressly extended coverage to 'adjoining area[s]'" on land. *Herb's Welding, Inc.* v. *Gray*, 470 U.S. at 420. The 1972 amendments "were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.'" *Id.* at 424 (quoting H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11 (1972)). For example, truck drivers and clerical workers, although performing their work on the newly expanded site of coverage, are not covered by the LHWCA, because they are not engaged in "loading, unloading, repairing, or building a vessel." S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972). See also *Caputo*, 432 U.S. at 266-267; *Perini*, 459 U.S. at 318. Thus, when the definition of "navigable waters" was broadened to include land-based sites, "it became necessary to describe affirmatively the class of workers Congress desired to compensate." *Caputo*, 432 U.S. at 264.[10]

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[10] In the course of its deliberations on the 1972 amendments, Congress rejected S. 1547, 92d Cong., 1st Sess. (1971), a bill that would have made the LHWCA the exclusive remedy

This legislative history provides no basis for concluding that, in enumerating certain occupations in Section 2(3), Congress intended to limit the remedies traditionally available to seamen. On the contrary, Congress retained the express exclusion for masters or members of the crew of any vessel. See *Caputo*, 432 U.S. at 264 n.22.[11]

B. Petitioner's Approach Is Inconsistent With the Remedial Purposes of the LHWCA and the Jones Act

The Jones Act, like the LHWCA, "is a remedial statute," *Wilander*, 111 S. Ct. at 814; the Court has recognized an "obligation not to narrow unduly the

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for offshore oil workers. See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 418-420 (1972) (statement of Joseph M. Shelton); *id.* at 602 (statement of John R. Martzell). The bill was opposed on the ground that it would relegate an entire class of workers traditionally treated as crew members to the less advantageous remedy available under the LHWCA. See *id.* at 589-590 (statement of Maritime Trades Dep't, AFL-CIO). See also *Herb's Welding, Inc.*, 470 U.S. at 420 n.5.

[11] Petitioner's reliance (Pet. Br. 37-39) on the 1984 amendments to the LHWCA is similarly misplaced. The 1984 amendments prohibit negligence actions by ship repairmen, ship builders, and ship-breakers (but not longshore workers) against employers who happen to own the vessel on which they are injured. See H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1, at 7 (1983). Because the 1984 amendments do not bar negligence actions against employer-owners, the amendments do not reflect an across-the-board intent to limit the employer's liability. In any event, the 1984 amendments concern only the remedies available to employees covered by the LHWCA. They do not affect the definition of a covered employee.

class for whom Congress provided recovery under the Jones Act," *id.* at 815. Although the LHWCA generally is interpreted broadly to further its remedial purposes, see, *e.g.*, *Caputo*, 432 U.S. at 268, it is not appropriate to construe the LHWCA to supplant remedies under the Jones Act, which is itsel a federal remedial statute that must be given broad effect. As Judge Wisdom noted in *Robison*, "[t]he process of liberal construction of the Jones Act cannot now be ignored because Congress has seen fit to pass the Longshoremen's Act." 266 F.2d at 774 (quoting *Carumbo* v. *Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941)).[12]

In *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715 (1980), this Court held that the 1972 amendments to the LHWCA did not supplant state workers' compensation remedies previously available to injured workers. Because the "thrust of the amendments was to 'upgrade the benefits,'" *id.* at 723 (quoting S. Rep. No. 1125, *supra*, at 1), the Court declined to preempt state remedies in the name of "uniformity." 447 U.S. at 726. It is at least as clear that the 1972 amendments were not designed to deny maritime employees the Jones Act remedy to which they were previously entitled.[13]

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[12] It is true that the LHWCA, like most workers' compensation statutes, struck a balance between the interests of workers and their employers. See *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 635-636 (1983). But the balance was not struck to the detriment of Jones Act seamen. On the contrary, Congress expressly excluded crew members from the scope of the LHWCA.

[13] We recognize that the court of appeals' decision would leave one category of employees—crew members whose employers are not negligent—without a remedy under either the Jones Act or the LHWCA. But this is simply a consequence

C. This Court's Decisions Construing the 1972 Amendments Do Not Support Petitioner's Position

Contrary to petitioner's contentions (Pet. Br. 20-25), this Court's prior decisions construing the 1972 amendments do not support a different reading of the statute or its legislative history. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), held that a worker who checked and marked cargo at a pier, and a terminal laborer who loaded and unloaded containers, barges, and trucks, were covered by the LHWCA. Similarly, *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 (1979), held that employees who performed the "intermediate steps of moving cargo between ship and land transportation" were engaged in maritime employment. *Id.* at 82. The Court's central concern in both *Caputo* and *Ford* was to interpret the status requirement in a way that eliminated Congress's "concern[] that some workers might walk in and out of [federal] coverage" depending upon the fortuity of whether they worked on land or water. *Ford*, 444 U.S. at 83 n.18. Congress's decision to eliminate the significance of the *Jensen* line for land-based workers does not imply a decision to restrict the remedies available to seamen. On the contrary, as the Court noted in *Caputo*, 432 U.S. at

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of providing the same treatment for all maritime employees who meet the "seaman status" test for coverage under the Jones Act. We also note that the Jones Act generally has not been held to require seamen to show a high degree of negligence, see, *e.g.*, *Bennett* v. *Perini Corp.*, 510 F.2d 114, 117-118 (1st Cir. 1975), and that a seaman unable to establish liability under the Jones Act may nevertheless be able to pursue claims for unseaworthiness (which does not require proof of negligience, see *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946)), or for maintenance and cure.

264 n.22, Congress retained the express exclusion for crew members.

In *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297 (1983), the Court refused to revive the "maritime but local" distinction to mark a dividing line between federal and state compensation systems. The Court found nothing in the 1972 amendments or their legislative history to "indicate that Congress intended to withdraw coverage from employees injured on the navigable waters in the course of their employment as that coverage existed before the 1972 Amendments." *Id.* at 325. The Court was careful to note that a worker injured on navigable waters "satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he * * * is not excluded by any other provision of the Act." *Id.* at 324.[14]

III. PETITIONER'S POLICY-BASED ARGUMENTS ARE UNPERSUASIVE

Petitioner argues (Pet. 8) that the court of appeals' decision will impose "an unreasonable economic burden" on financially troubled employers. The short answer to this argument, as well as to petitioner's other policy-based arguments, is that it cannot alter the plain language of the LHWCA. In any event, petitioner's policy arguments fail on their own merits.

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[14] Contrary to petitioner's contention (Pet. Br. 24 n.85), *Perini* does not conflict with *Wilander*, because there was no evidence that the injured worker had the requisite connection to a vessel to qualify as a Jones Act seaman.

A. The Court of Appeals' Decision Will Not Lead to Double Recoveries

Petitioner states (Pet. Br. 12) that the court of appeals' decision "allows an injured worker to possibly receive both a jury award and a LHWCA remedy, despite Congress' intention that he receive one or the other, but not both." If petitioner is suggesting that there may be a double recovery, the suggestion is flatly wrong. Any benefits paid by an employer under the LHWCA are credited against a subsequent Jones Act award. See *Simms* v. *Valley Line Co.*, 709 F.2d 409, 412 n.3 (5th Cir. 1983); 4 A. Larson, *Workmen's Compensation Law* § 90.51(a), at 16-508 to 16-509 & n.86 (1990) (collecting cases). Because the LHWCA and Jones Act are mutually exclusive, "[n]o problem of double recovery is involved: the compensation payments [under the LHWCA] will be routinely deducted from the damage recovery if the Jones Act action is successful." G. Gilmore & C. Black, *The Law of Admiralty* § 6-52, at 435 (2d ed. 1975). Cf. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 725 n.8 (1980) ("Of course, there is no danger of double recovery under concurrent [federal and state] jurisdiction since employers' awards under one compensation scheme would be credited against any recovery under the second scheme."). Moreover, Section 3(e) of the LHWCA provides that any amounts paid to an employee "pursuant to" the Jones Act "shall be credited against any liability imposed" under the LHWCA. 33 U.S.C. 903(e).

Petitioner also argues (Pet. Br. 5) that the court of appeals' decision will compel employers to insure maritime employees under both the LHWCA and Jones Act. Since employees are not entitled to double

recovery, it is not clear why employers should be required to pay full insurance premiums for coverage under both statutes. But in any event, this Court rejected a similar argument in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715 (1980), in the context of state workers' compensation remedies. The Court noted that "[t]he line that circumscribes the jurisdictional compass of the LHWCA—a compound of 'status' and 'situs'—is not less vague than its counterpart in the pre-'twilight zone' *Jensen* era." *Id.* at 725. Similarly, it may be difficult to determine in advance whether a particular employee falls within one of the LHWCA's occupations. See, *e.g.*, *Sharp* v. *Wasau Ins. Co.*, 917 F.2d 885, 887 (5th Cir. 1990) (rejecting determination that injured employee was a longshoreman). Thus, even under petitioner's approach, employers often could not rule out the possibility of Jones Act liability.

B. Under Established Principles of Issue Preclusion, Only an Adjudication Under the LHWCA That an Employee Is Not a Crew Member Precludes Litigation of a Jones Act Claim

Petitioner implies (Pet. Br. 9), and its amicus Shipbuilders Council of America expressly argues (Br. 21-23), that an employee's receipt of benefits under the LHWCA should preclude any subsequent litigation under the Jones Act. Under established principles of issue preclusion, however, respondent's acceptance of voluntary LHWCA payments does not preclude subsequent litigation of his Jones Act claim. Only if the question is actually litigated, and it is adjudicated that an employee is not a crew member, is the employee precluded from litigating a Jones Act claim. See, *e.g.*, *Boatel, Inc.* v. *Delamore*, 379 F.2d at 855; 4 A. Larson, *supra*, § 90.51(c), at 16-

519. See generally Restatement (Second) of Judgments § 27 (1982). It is in this sense that the LHWCA is not "a stepping stone on the way to a jury award." *Fontenot* v. *AWI, Inc.*, 923 F.2d 1127, 1133 & n.41 (5th Cir. 1991) (citing *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 480-482 (1982)). To go beyond the rules of issue preclusion in this context, and to apply some more draconian election-of-remedies rule to bar Jones Act relief, would be wholly inappropriate. As a leading commentator has observed, it "would undermine and prejudice the operation of this protective public program if the claimant were put in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of accepting or invoking this basic system of compensation" under the LHWCA. 4 A. Larson, *supra*, § 90.51(b), at 16-512.

In accordance with these principles, it is "universally accepted" that an employee who receives voluntary payments under the LHWCA, see 33 U.S.C. 914(a), 20 C.F.R. 702.231, is not barred from subsequently seeking relief under the Jones Act. 4 A. Larson, *supra*, § 90.51(a), at 16-507. See, *e.g.*, *Simms* v. *Valley Line Co.*, 709 F.2d 409 (5th Cir. 1983); *Robertson* v. *Donovan*, 219 F. Supp. 364 (E.D. La. 1963); *Lawrence* v. *Norfolk Dredging Co.*, 194 F. Supp. 484 (E.D. Va. 1961); *Chesser* v. *General Dredging Co.*, 150 F. Supp. 592 (S.D. Fla. 1957). Similarly, if a claim under the LHWCA is not adjudicated, the claimant is not precluded from seeking Jones Act relief. *Boatel, Inc.* v. *Delamore*, 379 F.2d 850 (5th Cir. 1967); *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953); *Oliver* v. *Ocean Drilling & Exploration Co.*, 222 F. Supp. 843 (W.D. La. 1963); *Boyles* v. *Humble Oil & Refining Co.*,

209 F. Supp. 857 (E.D. La. 1962). Absent an adjudication that satisfies the prerequisites for issue preclusion, there is nothing "sinister" about an employee who accepts benefits under the LHWCA and then proceeds to litigate a Jones Act claim. *Boatel, Inc.* v. *Delamore*, 379 F.2d at 854.

C. Petitioner's "Primary Jurisdiction" Argument Is Without Merit

Petitioner advances the novel proposition (Pet. Br. 40-45) that, where an employee is arguably covered by the LHWCA, the district court should "stay the Jones Act proceeding until the plaintiff has obtained a final LHWCA agency determination that he is a 'master or member of a crew,' *i.e.*, a Jones Act 'seaman.'" *Id.* at 44. We believe this argument is not fairly embraced within the question presented for review, which is addressed to whether those in the enumerated occupations are *per se* excluded from Jones Act coverage. See Sup. Ct. R. 24.1(a). But in any event, the argument is without merit.

Petitioner relies (Br. 44 n.155) on the exclusive remedy provision of the Federal Employees Compensation Act (FECA), 5 U.S.C. 8116(c). Petitioner is correct that, where there is a substantial question of coverage under FECA, the courts will stay or dismiss an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, until the Department of Labor determines whether FECA applies. See, *e.g.*, *DiPippa* v. *United States*, 687 F.2d 14, 20 (3d Cir. 1982); *Avasthi* v. *United States*, 608 F.2d 1059, 1060 (5th Cir. 1979). But petitioner is incorrect in drawing an analogy between the FECA/FTCA relationship and the LHWCA/Jones Act relationship. FECA—unlike the LHWCA—contains an

"unambiguous and comprehensive" provision barring any judicial review of the Secretary's determination of FECA coverage. *Lindahl* v. *OPM*, 470 U.S. 768, 780 (1985).[15] Thus, the courts have no jurisdiction over FTCA claims where the Secretary of Labor determines that FECA applies to the alleged injury. *Grijalva* v. *United States*, 781 F.2d 472, 474 (5th Cir.), cert. denied, 479 U.S. 822 (1986); *Heilman* v. *United States*, 731 F.2d 1104, 1109-1110 (3d Cir. 1984); *DiPappa*, 687 F.2d at 16.

In the LHWCA/Jones Act context, in contrast, Congress has assigned no such dominating role to the Secretary of Labor. The LHWCA contains no bar to judicial review, but instead provides for resolution of factual disputes by ALJs, review by the Benefits Review Board and, thereafter, by the courts of appeals. 33 U.S.C. 919(d), 921(b). *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 (1940), on which petitioner relies (Pet. Br. 41), stands only for the proposition that a fact-finder's determination of crew-member status must be accepted if it is supported by substantial evidence. See, *e.g.*, *Norton* v. *Warner Co.*, 321 U.S. at 571-573 (overturning deputy commissioner's determination that a bargeman was not a seaman). Thus, there is nothing anomalous about having a jury decide seaman status under the Jones Act.

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[15] Section 8128(b) provides that

> [t]he action of the Secretary or his designee in allowing or denying a payment under [FECA] is—(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

In addition, the Secretary is to decide all questions "arising under" FECA. 5 U.S.C. 8145.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1990

SOUTHWEST MARINE, INC.,

Petitioner,

vs.

BYRON GIZONI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?

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No. 90-584

In The

Supreme Court of the United States

October Term, 1990

SOUTHWEST MARINE, INC.,

Petitioner,

vs.

BYRON GIZONI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA"). The UBCJA is an international labor organization with affiliates in the United States and Canada. It enjoys a total membership of more than 567,000 working men and women. Many of those men and women work upon or about the navigable waters of the United States. They work as carpenters, shipwrights, piledrivers, divers, dive tenders, riggers, and marine platform builders. They construct and repair

the piers, wharves, dry docks, cargo terminals, building ways, marine railways, and other adjoining areas customarily used by the nation to load, unload, repair, build, and break vessels. They also work on rivers, in harbors, and upon the high seas above the outer continental shelf aboard vessels owned or operated by their employers. Their work is "inherently hazardous", and involves "the dangers commonly associated with maritime and construction work."[1] This Court has confirmed their maritime status under both the Longshore and Harbor Workers Compensation Act ("LHWCA")[2] and the Jones Act.[3] We respectfully submit that this status gives them an abiding interest in the question for review.

SUMMARY OF ARGUMENT

This case comes to court in the wake of *McDermott International, Inc. v. Wilander*[4], and steers us back towards the rocks and shoals of admiralty. In short, we're standing into "occupied waters" long "dominated by federal statute".[5] Petitioner Southwest Marine, Inc. ("Southwest") and its *amici* surge through those statutes under a

[1] 42 Fed.Reg. 27650, 37651 (July 22, 1977).

[2] *E.g., Director, OWCP v. Perini North River Assoc.*, 459 U.S. 293 (1983) [piledriver held Longshore "employee"].

[3] *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) [piledriver held Jones Act "seaman"].

[4] ___ U.S. ___, 111 U.S. 807 (1991).

[5] *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 327 (1990).

full head of steam, and ask the Court to answer our central issue summarily. This *amicus* would urge the parties to slow down and navigate a bit more carefully. "The precise scope of admiralty jurisdiction is not a matter of obvious principle or very accurate history."[6] As *Wilander* noted, the channel is confusing, conflicting, and filled with false starts.[7] Fortunately, the question at hand is a narrow one.

The Supreme Court granted *certiorari* herein only to determine whether employees from occupations specifically covered by the LHWCA can still go to a jury over their status as Jones Act seamen. In order to keep that question off the rocks, we need only steer past petitioner's siren-song suggestion that it can always be answered "as a matter of law".[8] This *amicus* respectfully submits that the issue of "who is a 'seaman' is better characterized as a mixed question of law and fact."[9] And that's the point where we depart from Southwest and its *amici*.

We all begin our voyage with the inarguable proposition that the Jones Act and the LHWCA are "a pair of mutually exclusive remedial statutes".[10] It follows perforce that once the District Court is satisfied from undisputed evidence that the plaintiff can only be a named beneficiary of the LHWCA, he or she is no longer entitled

[6] *U.S. v. Evans*, 195 U.S. 361, 365 (1906).

[7] *Wilander, supra*, 111 S.Ct. at 814-816.

[8] *E.g.*, Brief for the Petitioner, 42.

[9] *Wilander*, at 818.

[10] *Id.*, at 817.

to a Jones Act jury trial. But it does *not* follow that the District Court must summarily preempt a Jones Act jury trial merely because "the plaintiff is *arguably* covered by the LHWCA".[11]

Petitioner and its *amici* argue that the District Courts should defer their factfinding powers to an administrative agency, and dismiss Jones Act complaints as a matter of law, whenever the plaintiffs have accepted voluntary LHWCA compensation. Whether or not this would ultimately produce the many social and judicial economies which the opening briefs vouchsafe, it will certainly affront a long line of established authority, and perhaps even abdicate the courts' admiralty powers.

The UBCJA therefore takes issue with the assertion that a vessel-based maritime worker like Byron Gizoni is automatically barred from prosecuting a Jones Act claim merely because he might be covered under the LHWCA. We respectfully submit that the inquiry into a plaintiff's vessel-based employment status is "fact-specific".[12] Absent a prior administrative determination that the plaintiff was injured in an occupation specifically covered by the Longshore Act, and collaterally estopped from asserting standing as "a member of a crew", the question of whether his or her Jones Act status should be submitted to a jury depends, like all "fact-specific" inquiries, on whether reasonable people could differ over the outcome.[13] It is not enough that the plaintiff has accepted, or

[11] Brief for the Petitioner, 44.

[12] *Wilander, supra,* 111 S.Ct. at 818.

[13] *Id.*

even applied for, compensation benefits, or that he or she is "arguably covered by the LHWCA". That is exactly the type of argument which only a jury can decide. We therefore respectfully urge the Supreme Court to affirm the decision below.

ARGUMENT

I.

THE QUESTION FOR REVIEW IS VERY NARROW, AND DOES NOT CALL FOR ANOTHER RECONSIDERATION OF THE TEST FOR JONES ACT STATUS.

Although this Court's "power to decide is not limited by the precise terms of the question presented"[14], its rules are very specific: "We do not normally address any issues other than those fairly comprised within the questions presented by the petition for *certiorari* and any cross petitions."[15] As a consequence, "the brief may not raise additional questions or change the substance of the questions already presented in those documents."[16]

Southwest's petition for *certiorari* set forth six questions, but the writ of *certiorari* was limited to Question 3:

> ***"Are employees who are in occupations specifically covered by the Longshore Act nonetheless***

[14] *Procunier v. Navarette,* 434 U.S. 535, 559 n. 6 (1978).

[15] *Lake Country Estates, Inc. v. Tahoe Reg. Plan.,* 440 U.S. 391, 398 (1979).

[16] United States Supreme Court Rule 24.1(a).

entitled to a jury trial to determine their status as Jones Act seamen?"

This is a very narrow question. First of all, as even Southwest points out, "[t]his case does *not* involve the more general 'harbor worker' category of 'maritime employee', but rather only the specific occupation of 'ship repairman'."[17] According to section 2(3), the LHWCA specifically covers "any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker."[18] But coverage "is not limited to the occupations specifically mentioned in Section 2(3)".[19] Those trades are "only part of the larger group of activities that make up 'maritime employment' ".[20] After years of confusion, it is now clear that the LHWCA reaches virtually everyone who is regularly employed and ultimately injured upon actual navigable waters.[21] Needless to say, this embraces a wide variety of occupations. As Professors Gilmore and Black explained, "the almost infinite range of the conditions of waterfront employment has been detailed in thousands of cases."[22] Happily, we need linger among those cases just long enough to note that they are *not* at issue here.

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[17] Brief for the Petitioner, 16, n. 44.

[18] 33 U.S.C. § 902(3).

[19] *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423-424 (1985).

[20] *P.C. Pfeiffer v. Ford*, 444 U.S. 67, 77 n. 7 (1979). *See, also, Chesapeake & Ohio Ry. Co. v. Schwalb*, ___ U.S. ___, 110 S.Ct. 381, 384 (1989).

[21] *Director, OWCP v. Perini North River Assoc., supra*, 459 U.S. at 324.

[22] Gilmore & Black, *The Law of Admiralty* (2d ed.) 430.

The writ of *certiorari*, again, queries only whether those employees "who are in occupations specifically covered by the Longshore Act [are] nonetheless entitled to a jury trial to determine Jones Act status." It is therefore important to point out that the title "Longshore Act" is becoming more and more of a misnomer. Back in 1962, when the labor-saving changes wrought by "containerized" cargo were just beginning to sweep the industry, the Maritime Administration could still count over 70,000 American longshoremen.[23] By 1989, however, that number had dwindled to 29,339.[24] Shipyard work is declining apace. Barely a decade ago, American shipyards employed 94,925 production workers.[25] According to the latest figures there are only 62,328 left.[26] In short, the LHWCA's named beneficiaries are rapidly becoming an endangered species. Yet the number of cases compensated under the Act has been growing over the last several years.[27] The LHWCA's center of gravity is clearly shifting. The UBCJA merely wishes to emphasize that the dwindling interests of the Act's named beneficiaries do not necessarily represent those of "the larger group of

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[23] *The Annual Report of the Maritime Administration for Fiscal Year 1962* (U.S. Dept. of Trans. 1963) 19.

[24] *The Annual Report of the Maritime Administration for Fiscal Year 1989* (U.S. Dept. of Trans. 1990) 46.

[25] *The Annual Report of the Maritime Administration for Fiscal Year 1981* (U.S. Dept. of Trans. 1982) 45.

[26] *Id.*

[27] "Annual Report on Administration of the Act During Fiscal Year 1987: Submitted to Congress 1989" (U.S. Dept. of Labor, 1989) 27.

activities that make up 'maritime employment' ".[28] We therefore respectfully urge the Court to limit its inquiries to the question at hand lest the dwindling tail of the maritime industry wag what may be becoming a whole new dog.[29]

Refusing to confine themselves to that question, Southwest and its *amici* doggedly ask another: "What is the proper test for seaman's status pursuant to the Jones Act and general maritime law."[30] But this question was answered in *Wilander*. Southwest's petition originally posed it at a time when *Wilander* had not yet been decided. But the writ of *certiorari* herein was handed down in *Wilander*'s wake, and eschewed Southwest's mooted inquiry. In short, the opening briefs should not have addressed the seaman status question,[31] and the Court need not consider it.[32]

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[28] *P.C. Pfeiffer v. Ford, supra,* 444 U.S. at 77 n. 7.

[29] As Southwest points out, Congress codified one of the crucial distinctions between shipyard workers and all other maritime trades in 1984 when it amended Section 5(b) of the Act solely to prohibit shipyard workers from suing their employers as "vessel owners" under the "dual capacity" theory outlined in *Jones & Laughlin Steel Corp. v. Pfeiffer,* 462 U.S. 523, 528 (1983). *See* Brief for the Petitioner, 37-38. Workers "employed to provide ship building, repairing, or breaking services" are the only maritime employees who suffer that prohibition. 33 U.S.C. § 905(b).

[30] *See, e.g.,* Brief of *Amicus Curiae* Shipbuilders Council of America in Support of Petitioner, 13-20.

[31] United States Supreme Court Rule 24.1(a).

[32] *Lake Country Estates, Inc. v. Tahoe Reg. Plan., supra,* 440 U.S. at 398.

As *Wilander* explained:

> "The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. [Citation] In this regard, we believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work."[33]

This rule must now be allowed to percolate down through the lower courts where it can clarify and elaborate over time.[34] After steeping themselves in the subject for more than seventy-six years[35], those courts have already made it clear that a seaman must have a more or less permanent connection with an operating vessel or a

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[33] *Wilander, supra,* 111 S.Ct. at 817.

[34] *Id.,* 111 S.Ct. at 816 ["Following *Butler* [*v. Whiteman,* 356 U.S. 271 (1958) [*per curiam*]], we accepted no more of these cases, relegating to the lower courts the task of making some sense of the confusion left in our wake."]; *see, also, Yoash v. McLean Contracting Co.,* ___ U.S. ___, 111 S.Ct. 1068 (1991) [vacating judgment dismissing piledriver's Jones Act suit as a matter of law, and remanding the case to the Court of Appeal "for further consideration in light of *McDermott International, Inc. v. Wilander,* [*supra*]."].

[35] The Jones Act was passed on March 4, 1915. 38 Stats. 1185.

fleet.[36] There is no cause to re-examine that rule in this case.

Though it may sound strict and unbending, "the word 'permanent' has never been assigned a literal interpretation under the Jones Act, and should not be given a 'wooden application', but, rather, is to be used as an analytical starting point instead of a self-executing formula."[37] Petitioner and its *amicus*, the Shipbuilders Council of America, nonetheless urge the Court to board up seaman status behind a self-executing requirement that the plaintiff "normally sleep on the ship."[38] This suggestion offends the letter and logic of the law.

The Jones Act is a "humanitarian statute" which has always been interpreted liberally and with an eye towards enlarging its scope.[39] The assertion that its reach should now be confined to those few seafarers who still live aboard their vessels will give it a narrower ambit than most small town ordinances. Even a quarter-century ago, when the American merchant marine was still gear-

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[36] *E.g., Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (9th Cir. 1989); *Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir. 1986); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243-246 (5th Cir. 1983), *cert. den.*, 464 U.S. 1069 (1984); *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277, 281 (5th Cir. 1981).

[37] *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir. 1981).

[38] Brief of *Amicus Curiae* Shipbuilders Council of America, 17.

[39] *E.g., Cox v. Roth*, 348 U.S. 207, 209 (1954).

ing up for Vietnam, it boasted no more than 45,650 "seafaring shipboard jobs."[40] According to the most recent figures, that number is down to 14,268.[41] Congress never intended to restrict the protection of the Jones Act to so small a circle. And so the courts have repeatedly held.

Over the years, this Court has either affirmed Jones Act status or preserved it for the jury in a long list of "commuter seamen" cases involving ferry hands[42], dredge hands[43], tugboat operators[44], oil rig day laborers[45] wharfside handymen[46], barge boatmen[47], and maritime pile drivers.[48] In retrospect, these decisions make it clear that the distinction between land-based and sea-based employment turns not on where the plaintiffs sleep, but on where they work. According to *Wilander*, "[a]ll those who work at sea in the service of a ship face those particular perils to which the protections of maritime law,

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[40] *The Annual Report of the Maritime Administration for Fiscal Year 1962, supra*, 19.

[41] *The Annual Report of the Maritime Administration for the Fiscal Year 1989, supra*, 46.

[42] *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1979). *See, also, Helena Glendale Ferry Co. v. Walling*, 132 F.2d 616 (8th Cir. 1942).

[43] *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957).

[44] *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958); *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523 (1956).

[45] *Gianfala v. Texas Co.*, 350 U.S. 879 (1956).

[46] *Butler v. Whiteman, supra.*

[47] *Norton v. Warner Co.*, 321 U.S. 565 (1944).

[48] *Grimes v. Raymond Concrete Pile Co., supra; Yoash v. McLean Contracting Co., supra.*

statutory as well as decisional, is directed."[49] Seizing on this language, Southwest and its *amici* seem to suggest that workers cannot be truly "sea-based" unless they live aboard a seagoing vessel. As the admiralty answered back in 1896:

> "And so it seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world. Hence it is that in all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, 'no matter what may be their sex, character, station or profession.' "[50]

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[49] *Wilander, supra*, 111 S.Ct. at 817.

[50] *Saylor v. Taylor*, 77 F. 476, 479 (4th Cir. 1896). The *Saylor* case is not only onomatopoeic but peculiarly apt. It comprised a libel *in rem* against the owners of an inland dredge. Since the vessel was a small one, the libelants had to compete for priority. Mr. S.S. Saylor was a dredge hand seeking wages and a "seaman's priority". 77 F. at 476. A.J. Taylor & Bros. were towboat operators who disputed Saylor's standing as a seaman. *Id.* Reasoning exactly like Southwest and its *amici*, they urged the Court to dismiss Saylor's claim. The District Court granted their motion. The Court of Appeal reversed. Its decision echoes down the years in *Offshore Co. v. Robison* (266 F.2d 769 (5th Cir. 1959)) and *Wilander*.

We likewise submit that seamen don that legal raiment whenever they board their vessel, no matter where they bunk.[51]

The permanent connection requirement was designed to distinguish vessel-based workers from those whose associations with a ship are sporadic, transitory, fortuitous, or only incidental to a shore-based employment.[52] Courts from every level of decision have been drawing that distinction for decades.[53] There is no reason to disturb those decisions here. The seaman status question was answered in *Wilander*, and eschewed by the writ of *certiorari*. It lies outside the issue for review.

II.

EVEN THOUGH THE JONES ACT AND THE LONGSHORE ACT ARE MUTUALLY EXCLUSIVE, THEY ARE INEVITABLY CONNECTED BY A "ZONE OF UNCERTAINTY".

As we noted at the outset, *Wilander* leaves no doubt that the Jones Act and the LHWCA are "a pair of

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[51] *Ardoin v. J. Ray McDermott, supra*, 641 F.2d at 282 ["It is now clear that merely sleeping and eating aboard a support vessel does not make one a seaman if one does not otherwise meet the *McKie/Robison* criteria. [Citation] Nor does a failure to do so deprive one of seaman's status if these criteria are otherwise met."].

[52] *E.g., Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 479 (5th Cir. 1976); *Brown v. ITT Rayonier*, 497 F.2d 234, 237-238 (5th Cir. 1974).

[53] *See, gen.*, 2 Norris, *The Law of Seamen* (4th ed.) 341 *et seq.*; Gilmore & Black, *supra*, 328 *et seq.*; Engerrand & Bale, "Seaman Status Reconsidered", 24 S.Tex.L.J. 431 (1983).

mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees."[54] Launching their arguments from that firm ground, Southwest and its *amici* quickly jump in over their heads. They urge the Court to adopt what they have christened the "*Pizzitolo/ Wilander* rule"[55] – after the Fifth Circuit's decision in *Pizzitolo v. Electro-Coal Transfer Corp.*[56]

Pizzitolo was a Jones Act case brought by a waterfront electrician who spent "75% of his time maintaining and repairing . . . shore based machinery."[57] Following a full and fair jury trial, the District Court granted the defendant/employer a *j.n.o.v.* because the plaintiff was shown to have been "engaged in one of the occupations expressly covered by the LHWCA".[58] After reviewing all the evidence, the Fifth Circuit Court of Appeal concluded that the plaintiff was "a harbor-bound ship repairman" who was "unqualifiedly covered by the LHWCA", and "not 'a member of a crew' and thus not a Jones Act seaman."[59] This holding is perfectly consistent with the time-honored rule that a District Court may deny seaman's status as a matter of law only where there is no reasonable evidence to support a jury finding in plaintiff's favor.[60] Surging past that rule, Southwest and its

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[54] *Wilander, supra,* 111 S.Ct. at 817.

[55] *Amicus Curiae* Brief in Support of Reversal by Global Marine, Inc. *et al.*, 3.

[56] 812 F.2d 977 (5th Cir. 1987).

[57] *Id.*, 812 F.2d at 979.

[58] *Id.*, 812 F.2d at 982.

[59] *Id.*, 812 F.2d at 982-983.

[60] *E.g., Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1346 (5th Cir. 1980); *Owens v. Diamond M Drilling Co.*, 487 F.2d 74, 76

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amici leap to the conclusion that *Pizzitolo* signals the Fifth Circuit's readiness to dismiss Jones Act cases as a matter of law whenever "the plaintiff is *arguably* covered by the LHWCA".[61] But as that circuit meticulously explained in *Simms v. Valley Line Co.*:

> "Well recognized are the difficulties faced by the injured maritime workers arguably both seamen and harbor workers who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive (the Compensation Act, which for present purposes applies to all *but* seamen, and the Jones Act, which applies *only* to seamen), but which seem in practice to frequently overlap each other's borders;
>
> Thus, despite our continued insistence that a Jones Act 'seaman' and a 'crew member' excluded from the Longshoremen's Act are one in the same (in other words that the statutes are

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(5th Cir. 1973). *See, also, Leonard v. Dixie Well Service and Supply, Inc.*, 838 F.2d 291, 296 (5th Cir. 1987) [reversing summary judgment for the employer in a Jones Act case and distinguishing *Pizzitolo* on grounds that, under the indisputable evidence concerning the plaintiff's status there, "it was not surprising that he was eligible for LHWCA but not for Jones Act coverage."]; *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048, 1050 (5th Cir. 1988) [reversing and remanding summary judgment granted under *Pizzitolo* for factual determination as to whether plaintiff spent majority of his time as seaman or Longshore worker]; *Chauvin v. Sanford Salvage, Inc.*, 868 F.2d 735 (5th Cir. 1989) [same].

[61] Brief for the Petitioner, 44; *Amicus Curiae* Brief in Support of Reversal by Global Marine, Inc., *et al.*, 15 *et seq.*

> mutually exclusive) we recognize that in a practical sense, a 'zone of uncertainty' inevitably connects the two Acts."[62]

Southwest and its *amici* urge the Court to sever that Gordian connection with the blunt sword of summary determination.[63] But, as we shall see later, such a stroke would eventually come up against the adamant purpose beneath both statutes.[64]

III.

THE MERE FACT THAT VESSEL-BASED WORKERS ACCEPT, OR APPLY FOR, LHWCA BENEFITS DOES NOT SUMMARILY CUT THEM OFF FROM THEIR ORDINARY JONES ACT RIGHTS.

Southwest's assertion that a maritime worker's status can be determined summarily whenever he or she is *"arguably* covered by the LHWCA"[65] misconceives the whole purpose of that Act. The history of the LHWCA has been told well and often elsewhere.[66] It is enough to note that it was passed in 1927 to stop the gap left by the states' constitutional inability to compensate industrial

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[62] 709 F.2d 409, 411 (5th Cir. 1983).

[63] *Amicus Curiae* Brief in Support of Reversal by Global Marine, Inc., *et al.*, 23.

[64] Continues *Simms*, "[t]he recognition by this circuit that the Jones Act and the Longshoreman's [sic] Act each requires a 'liberal application in favor of claimant to effect its purposes,' has further contributed to the zone of uncertainty and to the dilemma of injured workers within it." *Id.*

[65] Brief for the Petitioner, 44.

[66] *See, e.g., Northeast Marine Terminals Co., Inc. v. Caputo,* 432 U.S. 249, 256-273 (1977); Gilmore & Black, *supra*, 404-455; Baer, *Admiralty Law of the Supreme Court* (3d ed.) 132-300.

injuries on navigable waters.[67] Congress expanded the Act's umbrella shoreward in 1972 in order to establish "a 'uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.' "[68] The '72 Amendments "changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured."[69] As Justice Kennedy presaged back in 1978, "neither test is precise, and cases will often arise which present questions of coverage that are difficult to resolve."[70] This Court attempted to resolve some of those difficulties in *Director, OWCP v. Perini North River Assoc. ("Churchill").*[71]

Churchill explained that there was "no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon navigable waters in the course of their employment . . . "[72] It therefore held "that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in Section 2(3), and is covered under the LHWCA, providing, of course, that he is the

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[67] *United Marine Mut. Indem. Ass'n. v. Donovan,* 701 F.2d 791, 792 (9th Cir. 1983).

[68] *Northeast Marine Terminal Co., Inc. v. Caputo, supra,* 432 U.S. at 272, *quoting* S. Rep. 13; H.R. Rep. 11, U.S. Code Cong. & Admin News 1972, p. 4708.

[69] *Caputo, supra,* 432 U.S. at 264-265.

[70] *Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137, 140 (9th Cir. 1978).

[71] *Supra.*

[72] *Id.,* 459 U.S. at 323.

employee of a statutory 'employer,' and is not excluded by any other provision of the Act."[73] The provision which interests us here, of course, is the crewmember exclusion in Section 2(3)(G).[74] According to *Wilander*, that exclusion "further defines Jones Act coverage".[75] It also highlights the overlapping "zone of uncertainty" which the Fifth Circuit recognized in *Simms*.[76] As can be judged from its holding, *Churchill* lies squarely within that zone.

The claimant in *Churchill* was a marine pile driver foreman (and, coincidentally, a member of the UBCJA) who had been engaged to build a New York City sewer outfall on the bottom of the Hudson River. He was "in charge of all work performed on a cargo barge used to unload caissons and other materials from the supply barges and to set caissons" on the river bottom.[77] Like the "seaman" pile driver in *Grimes v. Raymond Concrete Pile Co.*[78], the claimant in *Churchill* was more or less permanently connected with a special-purpose construction vessel in a capacity which contributed to her mission. Though it appears nowhere in the opinion itself, his job title was actually "barge captain". As even Southwest admits, he might well have been excluded as a "seaman" and "a member of a crew" had his employer only raised

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[73] *Id.*, 459 U.S. at 324.

[74] 33 U.S.C. § 902(3)(G) ["The term 'employee' . . . does not include . . . a master or member of a crew of any vessel;"].

[75] *Id.*, 111 S.Ct. at 814.

[76] *Supra*, 709 F.2d at 411.

[77] *Churchill, supra*, 459 U.S. at 300.

[78] *Supra* [vessel-based pile driver held Jones Act "seaman"].

that defense.[79] In short, he worked in the zone of uncertainty that inevitably connects the two Acts. We should consider the unusual dilemmas faced by such workers before accepting Southwest's invitation to deal with their situation summarily.

What *Simms* called "the plight of injured maritime workers employed at the border of harbor/work seaman status"[80] has been documented by a long line of cases beginning with *Reed v. The S.S. YAKA*.[81] Those cases all share the realization that "[t]here is nothing sinister about a worker who claims to be physically disabled from injuries incurred during his employment, attempting either personally or through counsel, to obtain recovery by whatever lawful remedy or remedies are available to him."[82] This is especially true in an age of congested courts and delayed litigation.[83] Without interim LHWCA

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[79] "Under the *Wilander* test, Churchill could conceivably be entitled to proceed to a jury trial to determine his status as a Jones Act seaman because his duties, at least arguably, contributed to the purpose or function of a vessel (the cargo or supply barges), and he, again arguably, had a more or less permanent connection to a vessel in navigation." Brief for the Petitioner, 24, n. 85

[80] *Simms, supra*, 709 F.2d at 411.

[81] 373 U.S. 410 (1963). *See, also, Simms, supra; Boatel, Inc. v. Delamore*, 379 F.2d 850 (5th Cir. 1967); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968); *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966); *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D.C.Ha. 1982); *Lewis v. Roland E. Trego & Sons*, 359 F.Supp. 1130 (D.C.Md. 1973); *Ramos v. Universal Dredging Corp.*, 15 B.R.B.S. 140 (BRB, 1982).

[82] *Boatel, supra*, 379 F.2d at 854.

[83] *See, gen., Report of the Federal Courts Study Committee* (April 2, 1990) pp. 4-10.

benefits, for example, workers injured in the zone of uncertainty might have to subsist on "maintenance and cure". That remedy dates back to a shipowner's medieval obligation to provide injured seamen with lodging, a nurse, a candle, and food[84], and can condemn 20th-century families to as little as $8.00 a day in interim benefits.[85] Worse still, maintenance and cure expires as soon as seamen reach "maximum medical cure" – whether or not they are able to return to work.[86] It is no wonder, then, that workers injured in the zone of uncertainty which connects the two Acts often seek succor under each.

It is therefore well established that "the mere acceptance of Compensation Act benefits without a formal adjudication of seaman status will not preclude subsequent Jones Act suit . . . "[87] In fact, where the evidence is enough to send the threshold seaman question to a jury, this Court has ruled that it is reversible error to permit the employer to prove that the worker accepted LHWCA benefits while waiting for trial.[88]

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[84] Gilmore & Black, *supra*, 281; 1 *Benedict on Admiralty* (7th ed.) 1-20.

[85] *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 946 (9th Cir. 1986).

[86] *Wood v. Diamond M Dredging Co.*, 691 F.2d 1165, 1170 (5th Cir. 1982). *See, also, Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Farrell v. U.S.*, 336 U.S. 511 (1949).

[87] *Simms, supra*, 709 F.2d at 412.

[88] *Tipton v. Socony Mobil Oil*, 375 U.S. 34, 37 (1963). *See, also, Eichel v. New York Central R.R. Co.*, 375 U.S. 253 (1963); *Simmons v. Hoegh Lines*, 784 F.2d 1234, 1237 (5th Cir. 1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523 (5th Cir. 1986). *See, gen.*, 2 Norris, *supra*, 360.

It is equally well established that injured workers cannot summarily cut themselves off from the Jones Act by filing an administrative application for LHWCA benefits.[89] The law in this area "tolerates no distinction between the mere availability or voluntary payment of compensation and a positive claim for it."[90] As the cases explain:

> "[N]ot to allow suit where compensation has been affirmatively sought would discourage the spontaneous initiation of payments. Under such a policy the employer who immediately and voluntarily begins compensation payments would be subject to suit; the employer who forces his employee to seek compensation would be immune from suit."[91]

In short, it was wrong of Southwest and its *amici* to suggest that the exclusive remedy provisions of the LHWCA[92] somehow estop a whole class of vessel-based workers from pursuing their potential Jones Act rights. "Rules of civil pleading allow alternative claims by the use of distinction and alternative counts, *n'importe* their inconsistency."[93] There is nothing at all inequitable about this[94] provided that uncertain workers advise the

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[89] *Simms, supra*, 709 F.2d at 411-412; *Biggs, supra*, 360 F.2d at 364.

[90] *Biggs, supra*.

[91] *Id.*

[92] 33 U.S.C. § 905(a).

[93] *Biggs, supra*, 360 F.2d at 364.

[94] *See Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2nd Cir. 1963).

Department of Labor and their employers that they intend to pursue alternative counts, so that "applicant and counsel would have been altogether candid with the agency, and the employer would be protected from duplication of payment by being advised through notice to withhold the sums paid by any judgment."[95] Thus:

> "If the plaintiff succeeds in [his subsequent Jones Act] suit, the employer may recoup the amounts already paid by deducting them when satisfying the judgment. In the event the compensation was paid by one insurer and the judgment becomes payable by another, the employer as the legal debtor in both instances may retain from the settlement of the judgment the sums necessary to reimburse the compensation carrier. The two remedies – compensation and suit – are thus made complementary. An important purpose of the compensation statutes, to provide immediate relief to an injured employee, is achieved and the injured party's opportunity to press further remedies remains unabridged."[96]

Congress effectively codified these points, together with the practical uncertainties from which they grew, in 1984 when it amended LHWCA Section 3 to establish a compensation credit for any amounts paid under the Jones Act.[97] Southwest and its *amici* close their eyes to this amendment. It demonstrates, yet again, that the border between the LHWCA and the Jones Act cannot always be drawn summarily. Where reasonable people can differ over the outcome, the question of who is or is

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[95] *Biggs, supra*, 360 F.2d at 365-366.

[96] *Id.*, 360 F.2d at 364.

[97] 33 U.S.C. § 903(e).

not a seaman must inevitably go to a jury unless the plaintiff has already been finally adjudged a named LHWCA beneficiary by a court of competent jurisdiction.

IV.

EVEN IF WE ACCEPT THAT THE DEPARTMENT OF LABOR HAS THE ADMINISTRATIVE AUTHORITY TO ENTER FINDINGS ON SEAMAN STATUS WHICH ARE COLLATERALLY CONCLUSIVE, THIS DOES NOT REQUIRE THE DISTRICT COURTS TO ABDICATE THEIR ARTICLE III POWERS IN ALL "ARGUABLE CASES".

In what is undoubtedly the "oddest" passage in its brief, Southwest argues that "Congress intended that Jones Act coverage be determined, not by a jury, but by the LHWCA."[98] Reasoning that Congress invested the Department of Labor with special powers over the seaman status question, petitioner suggests that the District Courts "should defer to the expertise of the LHWCA administrative agency" whenever the plaintiff is "arguably" covered by the compensation statute. Far from merely giving collateral estoppel effect to prior administrative judgments, Southwest would have the judiciary decline to hear a seaman's case "until the plaintiff [had] obtained a final LHWCA agency determination that he [or she] is a 'master or member of a crew,' i.e., a Jones Act 'seaman.' "[99] Though Jones Act litigation currently comprises no more than one percent of the District Court

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[98] Brief for the Petitioner, 43.

[99] *Id.*, 44.

docket[100], petitioner touts this remarkable abdication of Article III powers as a major economy. What makes this suggestion odd is that the Solicitor of Labor opposes it![101] What makes it odder still is that the decisions of the Benefits Review Board don't support it either.

The Benefits Review Board is the administrative tribunal which Congress fashioned to hear LHWCA appeals.[102] Drawing on its expertise in the field, the Benefits Review Board has always held that "[a]pplying the *Robison* test to Longshore cases would exclude large numbers of employees from Longshore coverage under the provisions of Section 2(3)."[103] As recently as last December, that agency was still interpreting the Act's crewmember exclusion under the very "aid to navigation" standard which this Court finally "jettisoned" in *Wilander*.[104] In short, the Board's decisions "do not believe that the option of proceeding under the Longshore Act, an act employing an administrative process and different adjudicatory standards than the Jones Act, should be foreclosed to those employees who would be excluded by application of the *Robison* test."[105] They have suggested, instead, that:

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[100] *Report of the Federal Court Study Committee, supra,* 62.

[101] *See* Brief of the United States as *Amicus Curiae* in Support of Respondent.

[102] 33 U.S.C. § 921(b).

[103] *Ramos v. Universal Dredging Corp., supra,* 15 B.R.B.S. at 179.

[104] *See Ryan v. Alaska Contractors, Inc.*, 24 B.R.B.S. 65, 68 (BRB, 1990).

[105] *Ramos, supra,* 15 B.R.B.S. at 144.

> "The law permits the claimant to pursue both these remedies for the same injury based on inconsistent claims as to his status at the time of injury. A seaman employee who is injured aboard his employer's vessel or on a vessel owned by a third party may recover compensation from his employer and still sue his employer and/or the third party for negligence and unseaworthiness."[106]

In other words, even the administrative agency to whom Southwest would have the courts defer insists that the question must ultimately go to a jury – at least where the injured worker's status has not yet been finally adjudicated.

"When the compensation process has gone beyond acceptance of benefits and even beyond the filing of a claim to the point at which a formal award has been entered," however, "a far more formidable defense looms, that of res judicata or collateral estoppel."[107] Though *Wilander* instructs that the findings of the Department of Labor are conclusive[108], "the extent to which collateral estoppel and res judicata will be applied to a Jones Act suit following a formal Board finding of non-seaman status and an award of benefits appears to be a matter of first impression [before this Court] (and one about which the commentators suggest there is uncertainty)."[109] As Gilmore and Black summed up:

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[106] *Ryan v. McKie,* 1 B.R.B.S. 221, 225 (BRB, 1974), *citing, inter alia, Reed v. The SSYAKA, supra; Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946); and *Biggs v. Norfolk Dredging, supra.*

[107] 4 Larson, *Workmen's Compensation Law,* § 90.51, pp. 16-357 to 16-367 (1983).

[108] *Wilander, supra,* 111 S.Ct. at 818.

[109] *Simms, supra,* 709 F.2d at 412.

> "Even the payment of benefits pursuant to a formal award in a contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the compensation award may have been made without a proper adjudication of the claimant's status as harbor worker or seaman. But the plaintiff who attempts to bring a Jones Act action following a compensation award in a contested proceeding may find himself barred in a court which takes res judicata and collateral estoppel seriously."[110]

Most of the cases which have declined to apply the bar did so not by eschewing the doctrine of res judicata outright, but by finding that the facts fell short of full compliance[111], either because the administrative decision was not yet final[112], or because the crewmember exclusion had not been contested.[113] There are, nonetheless, a handful of decisions which conclude outright that, because of the special policies involved, a Jones Act case cannot be barred by any administrative finding or award.[114] Happily, the Supreme Court need not pass on

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[110] Gilmore & Black, *supra*, at 435.

[111] *See, gen.*, 4 Larson, *supra*, § 90.51, at 16-357.

[112] *E.g., Simms, supra*, 709 F.2d at 413.

[113] *E.g., Boatel, Inc. v. Delamore, supra*, 379 F.2d at 854-855; *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 700-701 (5th Cir. 1963). *See, also, Bretsky v. Lehigh Valley R.R. Co.*, 156 F.2d 594, 596 (2d Cir. 1946) [declining to bar FELA claim with prior state compensation award where question of interstate commerce had not been litigated]

[114] *Biggs v. Norfolk Dredging, supra*, 360 F.2d at 365; *De Court v. Beckman Instruments, Inc.*, (1973) 32 Cal.App.3d 628, 635, 108 Cal.Rptr. 109.

this vexing question. It was not raised by the facts of this case. Southwest paid respondent Gizoni voluntary LHWCA benefits without any administrative determination that he was or was not engaged "in an occupation specifically covered by the Longshore Act" or excluded as "a member of a crew". This leaves us only with petitioner's odd notion that the federal judiciary should decline to hear a Jones Act case until "the plaintiff has obtained a final LHWCA agency determination that he is a 'master or a member of a crew' . . . " As we saw earlier, that notion wants even the support of the agency to whom Southwest would have the courts defer. Therefore, like the Solicitor General and the Solicitor of Labor before us, the UBCJA respectfully urges this Court to reject it.

CONCLUSION

As we noted at the outset, the admiralty sails in waters dominated by federal statute. Over the years, admiralty courts have charted a meticulous course between those statutes. Skirting, as it does, the overlapping humanitarian policies which are the bedrock of civil damages and workers' compensation, the course between the Jones Act and the LHWCA has been particularly well mapped. Petitioner and its *amici* want to redraw it. But as Professor Larson teaches:

> "The community has decided that injured workmen and their families shall have as a minimum the security that goes with non-fault compensation. It is not for the individual, once he is

part of that system, to elect whether its protection is a good idea for him or not. If he accepts or claims its benefits, this is not an election but merely the setting in motion of a protective process ordained by the state. This being so, it would undermine and prejudice the operation of this protective public program if the claimant were put in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of accepting or invoking this basic system of compensation protection. It is of the nature of compensation, as distinguished from damage actions, that it is intended to be both prompt and reliable, in order to perform its function of caring for the immediate economic and medical needs of an injured worker and his family. If, then, he accepts or claims compensation as his first move, perhaps fully intending to follow this with a Jones action, this should not be thought to be sinister, deceitful, or avaricious on his part. He is setting out to ensure that he gets the minimal social insurance protection that he may be entitled to. If it turns out later that he is entitled to a more generous award under a different system, since the compensation award will be credited on the larger award, there has been no serious harm done."[115]

To the contrary, after decades of careful consideration, the courts and commentators alike have determined that such results are in the best interest of society and the system. By urging the judiciary either to dismiss or defer all Jones Act claims which "arguably" fall under the LHWCA, Southwest and its *amici* would radically restructure that system. But if this is their goal, they

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[115] 4 Larson, *supra*, § 90.51, at 2 16-366 to 16-367.

should present it to Congress, not the courts. The UBCJA, therefore, respectfully urges the Court to affirm the decision below.

Dated: 15 May 1991

Respectfully submitted,

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(11)

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OF THE
United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I

THE ARGUMENTS OF RESPONDENT AND ITS *AMICI* IGNORE THE CONGRESSIONAL INTENT BEHIND THE LHWCA AND ITS AMENDMENTS.

The Ninth Circuit *Gizoni* decision that a ship repairman, who works on floats and platforms to repair various vessels in a shipyard, is entitled to proceed to a jury trial on a Jones Act seaman claim is inconsistent with the congressional intent behind the LHWCA and its amendments. Respondent and its *amici* would

prefer to ignore that congressional intent. Rather, Respondent and its *amici* repeatedly argue that the determination of Gizoni's status as a "seaman" is for the jury to decide.[1]

However, Respondent and its *amici* have simply failed to negate the unequivocal congressional mandate behind the LHWCA and its amendments to provide a uniform, no-fault compensation system to land-based maritime employees on the waterfront, without the expense, uncertainty, and delay that tort actions, such as Jones Act claims, entail. They have also failed to negate the congressional intent for the LHWCA to cover at least those employees, such as Gizoni, who are employed by a statutory employer on a covered situs in an occupation enumerated in the LHWCA.

The United Brotherhood of Carpenters and Joiners of America ("UBCJA") *Amicus*[2] argues that the Court should allow the Jones Act seaman status issue to "percolate" in the lower courts.[3] Or perhaps stated in a more candid fashion, to continue

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1 Respondent's citation to a section of the "Longshore Desk Book" published by the U.S. Department of Labor does not support his position, see Respondent's Brief, at pp. 17, 18, and is inappropriate. See November 24, 1986 Notice of then Chief Administrative Law Judge Robert Ramsey that the "Longshore Desk Book" "is not intended as final legal authority and should not be cited or relied upon as such." Vol. A, Benefits Review Board Service ("BRBS"), Section 6, page 6-iii.

2 Petitioner had stipulated with Respondent for the filing of two *amicus* briefs per side after being contacted by Mr. Hillsman and Mr. Easley, both of whom had initially advised that Mr. Hillsman would be filing an *amicus* brief on behalf of the American Trial Lawyers Assn./California Trial Lawyers Assn.

3 *Amicus* Brief of UBCJA, at p. 9.

to be litigated in the lower courts. However, allowing that issue to continue to be litigated in the lower courts may perhaps benefit some attorneys, but it would not benefit maritime employers and employees alike.

Perhaps most surprising, and indeed inexplicable, is the position of the United States. That may be due in part to the initial misunderstanding by the United States of the question presented herein for review. Contrary to that stated on page one of the *Amicus* brief for the United States, the present issue before the Court is *not* whether a maritime employee whose occupation is one of those enumerated in the Longshore Act may be a seaman within the meaning of the Jones Act.[4] That issue was resolved by the Court in *McDermott International, Inc. v. Wilander*.[5] In *Wilander*, the Court made clear that the LHWCA and Jones Act are "mutually exclusive; a 'seaman' under the Jones Act is excluded from the LHWCA as a 'member of a crew of a vessel' . . . ." It follows that a maritime employee whose occupation is one of those enumerated in the Longshore Act may not be a Jones Act seaman.

More troubling, however, is the position of the United States that a ship repairman employed by a shipyard and injured on a covered situs may nonetheless *not* be covered by the LHWCA. That position is inconsistent with the position advocated by the United States in earlier Longshore jurisdiction cases before the Court, and in particular, the position advocated by the United States as *amicus* in *Chesapeake & Ohio Railway Company v. Schwalb*.[6]

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4 *Amicus* Brief for the United States, at p. 1.

5 ___ U.S. ___, 111 S.Ct. 807, at 819 (1991).

6 ___ U.S. ___, 110 S.Ct. 381 (1989).

In *Schwalb*, the United States argued persuasively in its *amicus* brief to the Court that:

> . . . Congress defined "employee" [in Section 2(3) of the LHWCA] to mean "any person engaged in maritime employment." The breadth of the statutory language suggests that courts should take an expansive view of the LHWCA's extended coverage, ... Moreover, the remedial purposes of the 1972 amendments . . . demand a liberal construction of the status requirement. The legislative history of the 1984 amendments to the LHWCA further confirms the propriety of reading the status provision broadly . . . .
>
> 2. The state court's standard [like the *Gizoni* Ninth Circuit's standard] also conflicts with the principles of coverage enunciated by this Court as followed by the lower federal courts and the Benefits Review Board. This Court has explicitly admonished that the Act's status provision should be interpreted broadly and in functional terms, so that the Act achieves its objective of providing uniform coverage for those engaged in longshoring [and Petitioner submits ship repair] and related jobs.[7]

Moreover, the United States would also have the Court ignore its prior arguments in *Schwalb* that:

> The expansion by the 1972 amendments [to the LHWCA] is particularly telling for purposes of

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[7] Brief for the United States as *Amicus Curiae* for the Petitioners, pp. 8, 9, in *Chesapeake & Ohio Railway Company v. Schwalb*, ___ U.S. ___, 110 S.Ct. 389 (Case Nos. 87-1979 and 88-127) (1989).

> this case because it targeted . . . tort liability remedies as well. Congress made the decision to expand its federal workers' compensation system after giving the "most careful consideration" to a report prepared by the National Commission on State Workmen's Compensation laws. [Citations omitted.] The report compared state compensation systems to those providing remedies through actions for negligence. It found that a modern workers' compensation system could provide broad coverage through liability without fault, substantial protection against interruption of income, and assured provision of medical services, while "[e]mployees excluded from coverage are forced to fall back on liability suits, a drawn-out, costly and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases." [Citation omitted.] Thus, the Commission endorsed as an ultimate objective "universal mandatory coverage" of workers under compensation systems. [Citation omitted.] And, in order to further that goal, the Commission recommended, *inter alia*, "that the term 'employee' be defined as broadly as possible." [Citation omitted.] Congress, in turn, noted that "the provisions in [the 1972 amendments] are fully consistent with the recommendations of the . . . [Commission.][8]

The United States is thus requesting the Court to take an approach in this case not only contrary to the approach advocated by the United States as *amicus* in *Schwalb*, but also contrary to the approach to Longshore jurisdiction mandated by the Court[9] in

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[8] *Id.*, at pp. 14, 15, ftn. 10.

[9] See Petitioner's Opening Brief, pp. 20-31.

Calbeck v. Travelers Insurance Co.,[10] *Northeast Marine Terminal Co., Inc. v. Caputo*,[11] *P.C. Pfeiffer Co., Inc. v. Ford*,[12] and *Director, OWCP v. Perini North River Associates*.[13]

Respondent and its *amici* would also have the Court ignore the fact that "Congress's purpose to minimize litigation must enter the calculus of the Act's interpretation.[14] That purpose will be

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[10] 370 U.S. 114 (1962).

[11] 432 U.S. 249 (1977).

[12] 444 U.S. 69 (1979).

[13] 459 U.S. 297 (1983).

[14] The citation by the UBCJA to the report of the Federal Courts Study Committee is misleading. *Amicus* Brief of UBCJA, at pp. 23 and 24. That committee was formed in order to address the crisis which was developing in the federal court system due to the increase in litigated cases and jury trials. The Committee specifically recommended that Congress repeal the Federal Employers' Liability Act and the Jones Act.

The Committee also emphasized that: "Workers' Compensation schemes for claims of this type deliver benefits in less time, that are less costly than court actions, save attorneys' fees and are no-fault, i.e., they do not require the claimant to prove negligence." *Report of the Federal Courts Study Committee*, April 2, 1990, at p. 62. The Committee indicated that eliminating FELA and Jones Act cases would reduce the civil courts' docket by 2%. However, the Committee by no means discounted the economy to be achieved by the elimination of FELA and Jones Act cases. To the contrary, FELA and Jones Act cases comprise 5% of all civil trials, and about 8% of all civil jury trials. *Id.*

most effectively served by a bright line definition that clearly protects all activity on the waterfront that is 'integral to overall longshore operations.'"[15] That purpose will also be most effectively served by a bright line definition that protects under the LHWCA all activity of shipyard employees on the waterfront that is integral to overall ship construction and ship repair activity.[16]

However, the position of Respondent and its *amici* would maximize litigation to the detriment of employees and employers alike, without any real increase in benefits to those employees. The arguments of Respondent and its *amici*, if accepted, would also undermine the uniform LHWCA compensation system available to land-based maritime employees injured on the waterfront, and result in uncertainty, delay and costs associated with a tort liability system, possible double recovery, and clearly increased judicial case load.

Further, Respondent and its *amici* simply ignore one of the most severe consequences of their position. If LHWCA employees such as shipbuilders and ship repairmen can claim seaman status,

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[15] Brief for the United States as *Amicus Curiae* for the Petitioners in *Schwalb, supra*, at p. 19, ftn. 17.

[16] The arguments of the United States that Petitioner's approach would draw an "irrational distinction between those in the enumerated categories . . . and other maritime employees" makes little sense. *Amicus* Brief of the United States, at p. 7. Congress drew that distinction when it enacted the 1972 Amendments and provided an "occupational test" in Section 2(3). The Court's approach to Longshore jurisdiction cases has emphasized that distinction. *See, e.g., Caputo, supra; Ford, supra.*

then maritime employers can similarly deny LHWCA benefits to those employees for the same reason. Maritime employers have no incentive to voluntarily provide compensation and medical services pursuant to the LHWCA to those employees who can claim Jones Act seamen status. Longshore claims by land-based maritime employees, who worked aboard floating platforms and the like, would simply be controverted pursuant to 33 U.S.C. § 914(d). And, given the over-expansive application of the Jones Act test to maritime employees under either the *Gizoni* Ninth Circuit approach or the *Robison*[17] approach untempered by *Pizzitolo*,[18] that may cover many employees indeed.

If the Court adopts the *Robison* test without the *Pizzitolo* correlative rule, the federal and state courts will simply be swamped with Jones Act claims by maritime employees who, prior to *Wilander*, clearly fell under the Longshore Act.[19] Further, virtually any maritime employee, including a traditional longshoreman, could be found to be a seaman under the *Robison* test. The only reasonable way to avoid "opening up the floodgates" to Jones Act claims is to adopt the *Pizzitolo* approach.

The arguments of Respondent and its *amici* thus ignore the congressional intent behind the LHWCA and its amendments. They also disregard the severe repercussions of accepting their arguments. On the other hand, a conclusion that employees in occupations specifically covered by the LHWCA are ineligible for a jury trial to determine their status as Jones Act seamen is consistent with the congressional intent behind the LHWCA, and should be adopted by the Court.

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17 *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

18 *Pizzitolo v. Electro-Coal Transfer Co.*, 812 F.2d 977 (5th Cir. 1977), *cert. denied*, 484 U.S. 1059 (1988).

19 See Footnote 27, *infra*.

II

THE APPROACH OF THE FIFTH CIRCUIT IN *PIZZITOLO* IS CONSISTENT WITH THE CONGRESSIONAL INTENT BEHIND THE LHWCA AND ITS AMENDMENTS, AND *WILANDER*, AND SHOULD BE ADOPTED BY THE COURT.

The decision of the Court in *McDermott International, Inc. v. Wilander*[20] rests in part on the enactment of the LHWCA in 1927 as a compensation scheme for longshore and harbor workers, to eliminate Jones Act benefits to land-based maritime and harbor workers, and to substitute a compensation remedy for those workers.[21] Indeed, the Court declared in *Wilander* that "[t]he LHWCA restricted the definition of 'seaman' in the Jones Act only to the extent that 'seaman' had been taken to include land-based employees."[22]

Moreover, the Court emphasized in *Wilander* that with the passage of the LHWCA,

> . . . Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.[23]

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20 ___ U.S. ___, 111 S.Ct. 807 (1991).

21 *Seaman Status: The Supreme Court Recharts Its Course, Wilander and Gizoni*, Eileen Madrid, 51 Louisiana Law Review, No. 6, at p. ___ (July 1991).

22 *Wilander*, 111 S.Ct. at 817.

23 *Wilander*, 111 S.Ct. at 813.

Therefore, "[w]hether under the Jones Act or general maritime law, seamen do not include land-based workers."[24]

Respondent and its *amici* have ignored the import of *Wilander*. They would have virtually every case involving longshoremen, harbor workers, ship repairmen, shipbuilders, and shipbreakers, all land-based maritime workers who owe their allegiance to land-based employers, proceed to a jury trial for a determination of their status as Jones Act seamen if they worked aboard floating platforms.[25] However, a jury is particularly ill-suited to evaluate the congressional intent behind the LHWCA and its amendments for a uniform, no-fault compensation system to provide prompt medical services and compensation to land-based maritime workers[26] injured on the waterfront.[27]

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[24] *Wilander*, 111 S.Ct. at 814.

[25] Further, the continued viability of *Simms v. Valley Line Co.*, 709 F.2d 409 (5th Cir. 1983), cited by the UBCJA in support, is doubtful in view of the Fifth Circuit's later decisions in *Pizzitolo, supra*, and *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991), and more importantly, *Wilander*. Respondent and its *amici* appear to refuse to accept that the LHWCA and Jones Act are mutually exclusive. Continued "percolation" will not alter that fact.

[26] Indeed, discussion of the benefits available under the workers' compensation system have been found by some courts to unduly prejudice Jones Act juries. *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (5th Cir. 1977).

[27] Many, if not most, of the pile drivers/harbor workers previously deemed covered by the LHWCA may now arguably be excluded from LHWCA coverage as Jones Act seamen based on *Wilander*. *See, e.g., McIntosh v.* (continued...)

On the other hand, the approach of the Fifth Circuit in *Pizzitolo v. Electro-Coal Transfer Company*,[28] and *Fontenot v. AWI, Inc.*,[29] presages the Court's analytical approach in *Wilander*, and would limit those Jones Act cases that went to the jury. In *Pizzitolo* and *Fontenot*, the Fifth Circuit held that if a plaintiff in a Jones Act suit is covered by the LHWCA, he is ineligible for consideration as a Jones Act seaman. *Pizzitolo* and *Fontenot*, like *Wilander*, thus focus on the statutory language and the congressional intent behind the Jones Act and the later enacted LHWCA. Further, nothing in *Wilander* signals a rejection of the Fifth Circuit's refinement of *Robison*[30] in *Pizzitolo*.

Indeed, *Pizzitolo* and *Fontenot* help to dispel the prior confusion over the interplay between the Jones Act and the later enacted LHWCA. The arguments of Respondent and its *amici*, if

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[27](...continued)
Parkhill Goodloe Co., 4 BRBS 3, *aff'd* 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978) (employee working on barge to clean debris from waterway not aboard to aid in navigation; not excluded from LHWCA as a member of a crew); *Craig v. American Dredging Co., 10 BRBS 1014 (1979), aff'd*, 620 F.2d 285 (2d Cir. 1980) (barge foreman not aboard primarily to aid in navigation not excluded from LHWCA as member of crew). As a result, many of the cases previously addressed by the LHWCA may now be litigated in court, with the consequent increase in caseload for the judiciary, unless the *Pizzitolo* approach is followed.

[28] 812 F.2d 977 (5th Cir. 1977), *cert. denied*, 484 U.S. 1059 (1988).

[29] 923 F.2d 1127 (5th Cir. 1991).

[30] *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

accepted, would resurrect that confusion and the associated mischief which the LHWCA was designed to dispel. In *Pizzitolo*, the Fifth Circuit persuasively reasoned that:

> The 1927 LHWCA, in effect, amended the Jones Act to make Jones Act benefits available only to maritime workers not covered by the LHWCA. Harbor workers engaged in occupations such as longshoring, shipbuilding, and ship repairing, who were injured on navigable waters, were the intended beneficiaries of the 1927 [LHWCA]. The LHWCA as amended in 1972 expressly covered workmen engaged in these occupations . . . . Given the explicit coverage of workmen engaged in the enumerated occupations, we reject the notion that Congress could have intended to exclude them from the LHWCA as members of the crew of a vessel.[31]

Respondents and its *amici*, however, would prefer that each case proceed to a jury without consideration of the LHWCA. However, "indiscriminate application of [the] seaman status test by jurors to workers who are engaged in those specific occupations enumerated in [Section 2(3)] of the LHWCA generates an over-expansive class of Jones Act seamen, which includes many land-based ship repairmen, traditional longshoremen, and harbor workers whose only work on vessels is in port."[32] Nevertheless, the approach of the Fifth Circuit in *Pizzitolo* and *Fontenot*, applied as a threshold status issue, can provide the appropriate statutory standard sufficient to support dismissal or summary judgment under Federal Rules of Civil Procedure Rule 56 or its state

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[31] 812 F.2d 977, at 983.

[32] *Seaman Status: The Supreme Court Recharts Its Course, Wilander and Gizoni*, Eileen Madrid, 51 Louisiana Law Review, No. 6, at ____ (July 1991).

counterpart in cases involving workers engaged in occupations enumerated in Section 2(3) of the LHWCA.[33]

Respondent's reliance on *Herb's Welding, Inc. v. Gray*,[34] for the proposition that employees in occupations covered by the LHWCA are nonetheless entitled to pursue Jones Act claims against their employers is misguided. There was simply no claim for seaman status involved in that case. In *Gray*, the Court held that an oilfield worker, a welder, was not a maritime employee covered by the LHWCA. Moreover, the Court's footnote in *Gray* that workers not covered by the LHWCA may be able to pursue Jones Act claims if permanently attached to a vessel as seamen does not lend any support to Respondent's claim.[35] Gizoni is a ship repairman employed by a statutory employer on a covered situs and is thus covered by the LHWCA.

Respondent correctly points out that a basis for the District Court's entry of summary judgment was a finding that Gizoni was a ship repairman covered by the Longshore Act, rather than a seaman covered by the Jones Act. That decision was based in part upon a finding that the occupation in which Gizoni worked and the duties which Gizoni performed were covered by the LHWCA.

Respondent's statement of facts in his opposition amounts to a third recharacterization of the evidence presented to the District Court. However, Respondent has not disputed the basic premise that he was a rigging foreman employed to repair ships on behalf of Petitioner Southwest Marine. Indeed, Respondent stipulated that he is a ship repairman.[36] Nevertheless, almost any employee could claim that questions of fact exist, thereby ensuring that the case proceeded to a jury trial. That approach would disrupt the uniform Longshore compensation system.

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[33] *Id.*

[34] 470 U.S. 414 (1985).

[35] 470 U.S. at 417, fn. 2.

[36] Respondent's Brief, at p. 20.

Like many riggers, Gizoni was called upon to walk across the vessels he repaired, and he also walked across and worked aboard certain floating platforms which Respondent characterized as barges for the purpose of opposing the summary judgment motion. Nevertheless, Petitioner has not denied that floating platforms or barges are occasionally used in the removal of rudders, shafts and propellers, and are occasionally used to position workmen alongside the vessels being repaired.

As a rigger, Gizoni was responsible for the movement of materials and equipment on and off of vessels. Respondent contends that certain barges were "assigned" to the Rigging Department and riggers worked aboard them on a daily basis.[37] However, that allegation cannot alter the nature of the work of riggers and ship repairmen. Riggers work in most shipyards in the United States and that shipyard work requires that materials and equipment be moved via floating platform.

If, as Respondent contends, the District Court was incorrect in finding that Gizoni was covered by the Longshore Act, then virtually every ship repairman would be excluded from Longshore coverage. The Longshore Act from its inception has applied to work aboard vessels and necessarily involves floating platforms and equipment. The allegation of "assignment" to a vessel and contribution to its mission could be made by almost any employee or employer concerning most longshore or harbor work. Further, Respondent's references to tug boats, inter-harbor transportation of parts or equipment, river barges and the "NASSCO crane accident" have nothing to do with this case.

Any legal standard is always subject to more difficult test cases. Respondent's claim that tugboat operators and crew members would be excluded by Petitioner's approach and would be difficult to reconcile with decisions of the court and the lower courts is superfluous. Tug captains, boat operators or crew

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[37] Respondent's Brief, at pp. 2, 3, 11, and 12.

members of tugs have not posed difficult test cases under the Longshore Act-Jones Act interplay. To the contrary, the lack of reported cases suggests that employees and employers have seldom found it necessary to litigate the status of such employees. Instead, it is the construction workers, longshoremen, riggers, shipbuilders and ship repairmen which form the crux of the dispute over seaman status. And, the *Pizzitolo* approach by the Fifth Circuit would remedy that problem.

III

THE POSITION OF RESPONDENT AND ITS *AMICI* RESURRECTS THE MISCHIEF WHICH THE LHWCA WAS DESIGNED TO AVOID.

Respondent has agreed and stipulated that he is a "ship repairman."[38] However, Respondent argues that because the term "ship repairman" is subject to certain exclusions set forth in Section 2(3) of the LHWCA, the term "ship repairman" adds nothing to the definition. Respondent's argument is circular, and has been rejected by the Court.[39] If one accepts that the definition of employees covered by the LHWCA is subject to the exclusion found within Section 2(3)(g), then *any* employee who claims an exclusion under that section would be entitled to proceed to a jury trial. However, the Court has determined that the term "seaman" as used by Congress in the Jones Act is limited by the Longshore Act.[40] If one accepts Respondent's argument, that limitation would be meaningless, and would maximize litigation in the Longshore and civil forums.

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[38] Respondent's Brief, at p. 20.

[39] *Wilander*, 111 S.Ct. at 817.

[40] *Id.*

Respondent and its *amici* would appear to prefer that a vague standard be used by juries in determining seaman status. To that end, they argue that no further clarification of the test for seamen status is necessary. The trial lawyers may prefer that there be no further clarification of the seaman status test, since an ambiguous seaman status test would result in increased litigation. However, the Court has acknowledged that the law in this area is a morass.[41] Therefore, the Court should read the Jones and Longshore Acts in light of the mischief to be corrected, which does require clarification from the Court.

Respondent also argues that the term "land-based maritime worker" adds vagueness to the law. In effect, Respondent suggests that that standard is "misleading" and "obviously incorrect" as applied to certain crewmen. Respondent obviously disagrees with the land-based versus sea-based standard determined by the Court in *Wilander*. Indeed, Respondent and its *amici* appear to characterize every manner of construction worker and harbor worker as susceptible to satisfying the *Robison*[42] seamen status test. That is, such workers may perform substantial work aboard a vessel and aid in the mission or work of that vessel. Therefore, almost all such employees would be excluded from Longshore coverage. However, that is, as shown earlier, contrary to the congressional intent behind the LHWCA.

Respondent's rhetorical question, "what does Southwest Marine really want out of this case?" is obviously meant to suggest that Petitioner seeks to distort an existing, unambiguous maritime law which has developed surrounding the Longshore and Jones Acts. However, the law that has developed is a "morass." That law unnecessarily burdens employers and employees alike. Furthermore, Respondent's fabrication of hypothetical and difficult to analyze cases under proposed or existing law should not divert

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[41] *Wilander*, 111 S.Ct. at 814, 816.

[42] 266 F.2d 769 (5th Cir. 1959).

the Court from addressing the problem at hand. This case involves a ship repairman employed by a shipyard on a covered situs.

Respondent does not dispute that Congress left it to the courts to fashion a test for seaman status. However, many courts, not familiar with the characteristics of maritime employment and maritime ventures, have struggled with the issue and consequently have chosen to abdicate issuing decisions in favor of allowing a jury trial. That situation has not assisted maritime employees or employers. Instead, the lack of workable standards has compounded the problems surrounding the Jones and Longshore Acts and the uncertainty for employers and employees alike.

The Court has recently accepted the guidance of the Fifth Circuit with respect to clarifying the basic standard applicable to seamen status.[43] The Court should also adopt the Fifth Circuit's approach regarding the interaction between the Longshore and Jones Acts and the appropriate means for resolving cases which are arguably covered by the two Acts.[44]

Respondent also claims that Congress did not grant immunity to shipyards from Jones Act claims.[45] Yet the Court and virtually every lower court have agreed that the Longshore and Jones Acts are mutually exclusive. Respondent thus claims an abstract exclusivity which in reality fails to provide any exclusivity. *Amicus* UBCJA also argues openly that in order to properly compensate maritime workers, those workers require

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[43] *See Wilander, supra,* affirming the seaman status test enunciated in *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959).

[44] *See Pizzitolo v. Electro-Coal Transfer Co.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); and *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (1991).

[45] Respondent's Brief, at p. 22.

access to both seaman and Longshore benefits.[46] However, that argument should be made to Congress.

Respondent's loose use of authority is also demonstrated by his discussion of the dual capacity doctrine, which is surrounded by confusion, and uncertainty. Certainly, *Edmonds v. Compaignie General TransAtlantique*[47] does not support the proposition for which it is cited, that prior to the 1984 Amendments *all* employees covered by the Longshore Act could file third party negligence actions against their employers if their employers were vessel owners and were negligent in their capacity as vessel owner.[48] Indeed, *Napoli v. Atlantic Lines Ltd.*[49] and *Allied Towing Corp. v. Tatans*,[50] both pre-*Edmonds* cases, were not only overruled by the 1984 Longshore Amendments, but were also overruled or modified by *Edmonds*. Furthermore, Respondent's citation to those cases adds nothing to Respondent's argument, other than to demonstrate that after the lower courts had acted to weaken shipyard immunity, Congress strengthened those immunities for shipyards with the 1984 Longshore Amendments.

Nevertheless, Respondent and its *amici* appear to acknowledge the problems with the existing system. *Amici* refers to many maritime workers as "an endangered species"[51] and admit that congested courts lead employees to seek remedies to which they are not entitled.[52] Indeed, *Amici* urge that

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[46] *Amicus* Brief of UBCJA, at pp. 19-21.

[47] 443 U.S. 256 (1979).

[48] Respondent's Brief, at p. 16.

[49] 536 F.2d 505 (2d Cir. 1976).

[50] 580 F.2d 702 (4th Cir. 1978).

[51] *Amicus* Brief of UBCJA, at p. 7

[52] *Amicus* Brief of UBCJA, at p. 17.

unreasonably low maintenance rates cause seamen working in a "zone of uncertainty" to seek a Longshore remedy, which was never intended to benefit them.[53] Yet, *Amici* make no suggestions for resolving that "zone of uncertainty."

Moreover, use of "interim" inconsistent remedies, rather than "subsisting on maintenance and cure" is a cynical suggestion. However, counsel for the UBCJA goes further. He also alludes to the creation of ostensibly mutually exclusive statutory systems, where only a "final adjudication" in one forum would bar liability in the other. That is, employers would be forced to controvert benefits under the LHWCA, forcing not only the filing of concurrent inconsistent claims, but also a final adjudication in whichever forum the employee files first.

The *Pizzitolo* approach urged by Petitioner on the other hand allows questionable cases to be first referred to the swift administrative system provided by the LHWCA. Clear cases such as the case herein could be summarily dealt with in the courts. A mere credit for the liability in one forum against any liability imposed in the other forum is simply insufficient. The cost of insuring against both Longshore and Jones Act exposures is prohibitive, and duplicative legal costs are likely. Indeed, a primary purpose of the LHWCA was to decrease the litigation costs to employers in return for providing prompt and predictable compensation benefits to maritime employees.[54] Respondent and its *amici* thus cannot seriously suggest that credit rights are the solution.

Petitioner urges the Court to follow the lead of the Fifth Circuit and adopt the *Pizzitolo* approach in the same fashion that the Court followed the lead of the Fifth Circuit in *Wilander* and

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[53] *Amicus* Brief of UBCJA, at p. 20.

[54] *See Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, at 636 (1983).

adopted the *Robison* test. The *Pizzitolo* approach is merely a refinement of *Robison* and should be adopted by the Court.[55]

CONCLUSION

The Ninth Circuit *Gizoni* decision resurrects the mischief which the LHWCA and its amendments were designed to dispel. On the other hand, the Fifth Circuit *Pizzitolo* approach is consistent with the congressional intent behind the LHWCA and its amendments, is in accord with *Wilander*, and serves the ends to be attained by the LHWCA. Therefore, Petitioner urges the Court to determine that employees in occupations specifically covered by the Longshore Act are ineligible to proceed to a jury trial to determine their status as Jones Act seamen. The Ninth Circuit decision should be reversed.

Respectfully submitted,

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[55] *See Seaman's Status Reconstructed*, Kenneth G. Engerrand, 32 S.Tex. L.R. 169, at 181, n. 91 (1991).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,

Petitioner,

v.

BYRON GIZONI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?

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BRIEF OF AMICUS CURIAE SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Shipbuilders Council of America is a voluntary, nonprofit national trade association comprised of fifty-one member firms, corporations, partnerships, and organizations engaged in shipbuilding, ship repairing, and allied industries in the United States. The Shipbuilders Council was founded in 1920 for the purpose of promoting a sound private shipbuilding and ship repairing industry in the United States, promoting an adequate mobilization potential of privately-owned

shipbuilding, ship repairing and allied industries in times of national emergency, and affording a means of cooperation between government and industry in matters of national concern.

The members of the Shipbuilders Council employ over 120,000 employees in the United States, many thousands of whom hold jobs comparable to the job held by Respondent Gizoni with Southwest Marine, Inc.[1] The shipbuilding and ship repairing industries are vitally interested in the outcome of this action in that it will affect whether shipyard workers performing ship repairs are properly classified as land-based maritime workers entitled to benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA") or as seamen covered by the Jones Act, 46 U.S.C. § 688(a). The industry considers employees engaged in the occupations enumerated in Section 2(3) of the LHWCA, 33 U.S.C. § 902(3),[2] to be land-based employees entitled to compensation under the LHWCA, and not Jones Act seamen. Employers in the industry routinely and voluntarily pay claims filed by their employees under the LHWCA for work-related injuries.

The decision of the Ninth Circuit in the case before the Court greatly complicates the handling of LHWCA claims filed by shipyard workers. That decision makes

[1] Petitioner Southwest Marine, Inc. is a member of the Shipbuilders Council. A complete list of the members of the Shipbuilders Council appears in Appendix A.

[2] These occupations include longshoremen or other persons engaged in longshoring operations, and other harbor workers including shipbuilders, ship repairers, and ship breakers, but do not include members of a crew of a vessel. 33 U.S.C. §§ 902(3), (3)(G).

it virtually impossible for a shipyard to predict accurately whether a worker will be classified as a maritime worker entitled to LHWCA benefits or as a Jones Act seaman. An employer that promptly and voluntarily pays a claim arising out of an injury is now faced with the possibility that it will incur additional liability in a negligence suit filed by the worker. The Ninth Circuit's holding is inconsistent with the interpretation given the Jones Act and the LHWCA by this Court, and it should be overturned.

There is an urgent need to resolve the uncertainty that now exists as to the status of shipyard workers. Until it is resolved, domestic shipyard companies will have to absorb additional and substantial risk management costs to protect themselves from potential dual compensatory awards for injured shipyard workers. This financial concern is real, as in the last ten years, 11 of the 19 shipyard companies used by the Bureau of Labor Statistics to compute wage indices for shipyard employees have ceased operations (*see* Appendix B). Although LHWCA benefits have increased dramatically in recent years, they remain predictable and quantifiable. Jury awards for negligence actions would be anything but predictable, and would impose unmanageable costs on shipyards. If the Ninth Circuit decision is not overturned, shipyard workers would be entitled to an election of remedies or to duplicate remedies, putting additional pressures on an already financially strapped industry.

The Shipbuilders Council stresses the industry's need for a uniform, predictable test for coverage under the LHWCA and the Jones Act. The Shipbuilders Council proposes a test to be employed in determining whether an individual has a sufficient connection with

a vessel to be considered a "seaman" for purposes of the Jones Act. That test, if adopted, would simplify the administration of LHWCA claims and remove virtually all of the uncertainty over whether an individual is properly classified as a seaman under the Jones Act or as a land-based maritime worker covered by the LHWCA.

SUMMARY OF THE ARGUMENT

There are two types of maritime workers—individuals who are assigned to a ship's crew and land-based maritime employees who work on ships while in port. The LHWCA by its terms makes clear that a person cannot be both a land-based maritime worker entitled to LHWCA benefits and a seaman or member of a crew entitled to bring a negligence action under the Jones Act. Those statutes create a pair of mutually exclusive remedies.

Congress has repeatedly expressed its intention that the Jones Act remedy does not apply to land-based maritime workers such as Respondent Gizoni. In enacting the LHWCA and various amendments to it, Congress expressed its intention that land-based maritime workers (such as longshore and harbor workers, ship repairers, shipbuilders, and ship breakers) should be treated in the same manner as other land-based workers covered by workers' compensation statutes. Each time the courts have attempted to expand the Jones Act negligence action to non-seamen, Congress has reacted and limited the seaman's remedy to those persons who are permanently assigned to a ship's crew. Land-based maritime workers do not face the perils of the sea, but face workplace hazards resembling those faced by other land-based workers. The

LHWCA is a workers' compensation law analogous to state workers' compensation laws protecting non-maritime employees. It strikes a balance permitting a maritime employee to receive compensation for a work-related injury even where the employer was not at fault, but it prohibits a separate negligence action against the employer.

The Jones Act should be limited to individuals permanently assigned to a ship's company. The Court has held that there must be an "employment-related connection to a vessel in navigation" for the Jones Act to apply. That connection cannot be met by persons who are assigned incidental repairs on a ship docked or drydocked at a shipyard.

As a matter of law, Gizoni did not have sufficient connection to a vessel in navigation to be considered a Jones Act seaman. He had no employment-related connection to any vessel, but rather was assigned to work on ships coming into his employer's shipyard for repairs. The district court properly granted summary judgment for Southwest Marine. There is no dispute over any issue of material fact and Southwest Marine is entitled to judgment as a matter of law.

Finally, Gizoni should be estopped from even asserting he is a Jones Act seaman. He applied for and accepted benefits from Southwest Marine under the LHWCA, which applies only if an employee is *not* a seaman. The doctrine of equitable estoppel precludes Gizoni from changing that position to seek additional benefits on a tort theory against Southwest Marine.

ARGUMENT

The Court's decision this term in *McDermott International, Inc. v. Wilander*, 111 S. Ct. 807 (1991),

settled a number of previously unsettled issues regarding the scope of coverage of the Jones Act and the Longshore and Harbor Workers' Compensation Act. *Wilander* made clear that a member of a ship's company need not actually aid in the navigation or transportation of the vessel to be a Jones Act seaman. The Court also decreed in *Wilander* that the Jones Act and the LHWCA are mutually exclusive statutory schemes and that the definition of "seaman" under the Jones Act is coextensive with the definition of the exception to the LHWCA for a "master or member of a crew." Finally, the Court clarified that "master or member of a crew" and "seaman" should be defined in terms of the employee's connection to a vessel in navigation, as that connection implements the distinction intended by Congress between land-based and sea-based maritime workers. Thus, the Court held that "[t]he key to seaman status is employment-related connection to a vessel in navigation." 111 S. Ct. at 817.

The *Wilander* case did not require the Court to address the scope of the employment-related connection to a vessel in navigation necessary to confer seaman status on an individual. That issue is raised by the instant case. The Shipbuilders Council submits that Respondent Gizoni did not, as a matter of law, have sufficient connection with a vessel in navigation to be classified as a "seaman" for purposes of the Jones Act.

I

THE STATUTORY CONTEXT OF THE LHWCA MAKES CLEAR THAT INDIVIDUALS IN MARITIME OCCUPATIONS ENUMERATED IN THE LHWCA ARE NOT JONES ACT SEAMEN

The LHWCA distinguishes between two types of maritime workers—longshore and harbor workers on the one hand, and masters and members of a crew of a vessel on the other. The statute recognizes that there are many employees who work "upon the navigable waters of the United States" who are not masters or members of a crew of a vessel. *See* 33 U.S.C. § 902(4).

The LHWCA applies to employees who build, repair, load, or unload vessels but who are not assigned to a vessel's crew. The definitional sections of the LHWCA make clear that a person cannot be treated both as a longshore or harbor worker and as a member of a crew of a vessel. As a matter of law, an employee in an occupation enumerated in the LHWCA is not a seaman under the Jones Act.

"Employer" is defined in Section 2(4) as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 902(4). An "employee" under the LHWCA is any person engaged in maritime employment *other than* a master or member of a crew of a vessel. Section 2(3) of the LHWCA provides as follows:

> "The term 'employee' means *any person* engaged in maritime employment, including any longshoreman . . . and any harbor-worker, but such term does not include . . . a master or member of a crew of any vessel."

33 U.S.C. §§ 902(3), (3)(G) (emphasis added).

The question presented to the Court is whether a person can be both a longshore or other harbor worker covered by the LHWCA and a Jones Act seaman. The LHWCA rejects such a dual status. The Court has held that the Jones Act and the LHWCA are mutually exclusive. *Wilander*, 111 S. Ct. at 817. A maritime worker is an "employee" covered by the LHWCA only if he or she is not a master or member of a crew of a vessel. If a worker is a master or member of a crew, he or she is not a land-based maritime employee entitled to LHWCA benefits. An individual can thus be either a harbor worker or a member of a ship's crew, but cannot be both. Land-based longshore and harbor workers (including ship repairers, shipbuilders, and ship-breakers) are not seamen covered by the Jones Act.[3]

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[3] The Shipbuilders Council suggests that Gizoni's argument can be analyzed algebraicly. The LHWCA's definition of employee can be diagrammed as follows: A = B but not C, where A represents the term "employee," B represents longshore and harbor workers, and C represents the master or member of a crew of a vessel. In algebraic terms, where A equals B and A does not equal C, then B does not equal C. Persons who fall within B (occupations specifically enumerated in the LHWCA) thus cannot also be C (members of a crew of a vessel). This algebraic formula is consistent with the Court's holding in *Wilander* that the Jones Act and the LHWCA establish mutually exclusive remedies. 111 S. Ct. at 817.

The Shipbuilders Council does not understand how shipyard workers such as Gizoni could be classified as anything but land-based maritime workers covered by the LHWCA, particularly given the nature of the work they were hired to perform. Shipyards do not hire those workers to sail the seas, and they do not assign them to ships. Shipyards hire those workers to repair and build ships in port. The plain language of the two statutes leaves room for no other conclusion.

II

CONGRESS HAS CONSISTENTLY REFUSED TO EXTEND JONES ACT REMEDIES TO LAND-BASED MARITIME WORKERS WHO BUILD AND REPAIR SHIPS IN THE SERVICE OF THEIR LAND-BASED EMPLOYERS

In numerous legislative pronouncements refining the Jones Act and the LHWCA, Congress has repeatedly expressed its intention that workers such as Gizoni are land-based maritime workers entitled to benefits under the LHWCA for injuries sustained on the job, and not seamen who may bring a Jones Act negligence action against their employer.

Under the general maritime laws of the 19th century, a vessel (and its owners) owed certain duties to a seaman falling sick or becoming injured during a voyage. Those duties included the maintenance and cure of the seaman for the duration of the voyage as well as strict liability for the ship's unseaworthiness, but did not include liability in tort through a maritime negligence action. *See The OSCEOLA*, 189 U.S. 158 (1903). In 1920, Congress overturned that maritime principle by enacting an amendment to the

Merchant Marine Act establishing a negligence remedy for "[a]ny seaman who shall suffer personal injury in the course of his employment." 46 U.S.C. § 688(a). That amendment is part of the Jones Act.

Congress did not define the term "seaman," and the result has been substantial uncertainty over the scope of the Jones Act. This Court first wrestled with the definition of seaman in 1926, and Congress promptly registered its disagreement with the Court's reading. In *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926), the Court interpreted the term to include "stevedores employed in maritime work on navigable waters." *Id.* at 52. The injured employee in *Haverty* was a land-based longshoreman injured while stowing freight in the cargo hold of a docked vessel. At that time, the LHWCA had not been enacted, and a different ruling would have deprived the injured worker of a remedy.

Shortly after the *Haverty* decision, Congress passed the LHWCA in 1927, and thereby created a general employers' liability statute similar to state workers' compensation laws. The LHWCA provided a statutory remedy—regardless of fault—to all maritime workers *other than* the "master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). In return for permitting maritime workers to receive compensation without regard to their employer's negligence, Congress declared that the compensation provided under the LHWCA shall be exclusive and in place of all other liability of the employer on account of an employee's injury or death. 33 U.S.C. § 905(a).

Some twenty years later, this Court extended general maritime law principles to land-based employees performing work on a vessel in port. In *Seas Shipping*

Co. v. Sieracki, 328 U.S. 85 (1946), the Court held that although a land-based maritime worker could not bring a Jones Act negligence action against his shipyard employer for injuries sustained, he could assert the traditional maritime remedy of unseaworthiness against a vessel owner if the worker "was doing seaman's work and incurring a seaman's hazard." 328 U.S. at 99. After *Sieracki*, that remedy was equally available to land-based employees working on docked vessels and to sea-based employees injured in the midst of an oceanic voyage. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 413 (1953).

Congress again rejected the Court's reading. In its place, Congress created a distinction between maritime workers who toil at sea and land-locked maritime laborers who are not exposed to the sea's perils. In 1972, Congress amended the LHWCA to clarify that land-based workers temporarily exposed to the hazards of the sea do not have the seaman's remedy for a ship's unseaworthiness. But those workers were not left without a remedy. First, they were still entitled to compensation from their employers under the LHWCA without regard to fault. Second, in place of an action for unseaworthiness, Congress added Section 5(b) to the LHWCA, which created a negligence cause of action against a vessel owner in favor of maritime workers *other than* crew members injured through a vessel's negligence. 33 U.S.C. § 905(b). The legislative history of that amendment illustrates Congress' intent to draw a distinction between land-based and sea-based maritime workers:

> In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen

> from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

S. Rep. No. 1125, 92d Cong., 2d Sess. 9-10 (1972).

In some cases, however, a shipyard worker's employer is also the vessel's owner. The question therefore arose whether, in such cases, an injured shipyard worker could bring a negligence action against the employer under Section 5(b) or whether the worker could recover compensation without regard to fault under Section 5(a). Once again the Court granted a seaman's remedy to land-based workers, and once again Congress stepped in. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 528 (1983), the Court held that where a shipyard employer was also a vessel owner, an exception to the exclusive liability provision of the LHWCA was created permitting an injured employee to bring an action for negligence against the employer under Section 5(b).

Congress moved quickly to overturn *Pfeifer* to clarify that the statutory remedy under the LHWCA is the only remedy for shipyard workers against their employer for injuries arising out of the course of their work, *regardless of whether that work is performed on land or on a ship being repaired*. In 1984, Section 5(b) was amended to provide that the cause of action created by that section is not available where the shipyard worker is injured through the negligence of

a vessel owned by his or her employer. Pub. L. No. 98-426, § 5(a)(1), 98 Stat. 1639, 1641. In enacting that amendment, Congress again articulated its intent that longshore and harbor workers be limited to the remedies established by the LHWCA even if they perform some of their work aboard vessels.[4]

III

SEAMAN STATUS SHOULD REQUIRE A DEFINITE AND PERMANENT CONNECTION TO A VESSEL IN NAVIGATION

As discussed in Part I, there are many employees who labor upon the navigable waters of the United States who are not Jones Act seamen. In *Wilander*, the Court held that an individual must have an "employment-related connection to a vessel in navigation" to be considered a seaman. 111 S. Ct. at 817. The Court said that a necessary element of an "employment-related connection" with a vessel is that a seaman perform the work of the vessel. *Id.* An employee who does not "contribute to the function of the vessel or to the accomplishment of its mission" is not a seaman. *See id.*

The Court has not yet been called upon to address directly the extent of connection to a vessel in navigation required to confer on an employee the status

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[4] This result is perfectly analogous to the result in *Johansen v. United States*, 343 U.S. 427 (1952), where the Court held that a federal government employee has no negligence cause of action for injuries sustained on a government-owned vessel. The worker's exclusive remedy is under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8101 *et seq.* The remedy provided under FECA is a typical workers' compensation remedy.

of seaman, but it has commented favorably on lower court decisions requiring a "definite and permanent connection" with a vessel. The Shipbuilders Council submits that the Court should now affirmatively impose such a requirement.

The "aid in navigation" requirement, which was eliminated by the *Wilander* decision, was the only element of the test of seaman status as to which there was any dispute in the lower courts. Led by the Fifth Circuit, the Courts of Appeals have consistently applied, as part of the test of seaman status, a requirement that the employee be more or less permanently assigned to a vessel in navigation. *E.g., Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243-44 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984); *Garcia v. Queen, Ltd.*, 487 F.2d 625, 628 n.6 (5th Cir. 1973); *Cox v. Otis Engineering Corp.*, 474 F.2d 613, 613 (5th Cir. 1973); *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971); *Bodden v. Coordinated Caribbean Transport, Inc.*, 369 F.2d 273, 274 (5th Cir. 1966); *McKie v. Diamond Marine Co.*, 204 F.2d 132, 136 (5th Cir. 1953); *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941); *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (5th Cir. 1938).

In *Maryland Casualty Co. v. Lawson*, quoted approvingly by the Court in *Wilander* (111 S. Ct. at 817), the Fifth Circuit stated:

> There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise and to protect her in an emergency, and a right to look to her and her earnings for wages. If she has a master, there is subjection to his commands. . . . Longshoremen who load and unload a vessel under temporary local employment do not become members of the crew, nor do mechanics who similarly come aboard her to repair or clean or paint her.

94 F.2d at 192.

This Court has never called into question the permanency element of the test of seaman status. In *Wilander*, the jury had found that the employee satisfied the permanency element imposed by the Fifth Circuit. This Court did not disturb that finding or imply that the permanency requirement was in any way improper. Indeed, the Court quoted with approval from the *Lawson* decision, which first imposed the requirement of a definite and permanent connection to a vessel.

The permanency element is consistent with the realities of life as a seaman. As the Court recognized in *Wilander*, sea-based maritime workers owe their allegiance to a vessel, not solely to a land-based employer. 111 S. Ct. at 813. They suffer the "perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* at 817. As Justice Stone pointed out in his dissent in *Seas Shipping Co. v. Sieracki*, traditional seamen's remedies have been "universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected." 328 U.S. at 104 (quoted in *Wilander*, 111 S. Ct. at 817).

Justice Stone quoted from Justice Story in *Reed v. Canfield*, 20 F. Cas. 426, 428 (C.C.D. Mass. 1832):

> Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea-service, which do not belong to home pursuits.

Seas Shipping Co. v. Sieracki, 328 U.S. at 105 (Stone, C.J., dissenting).

The labors of a seaman stand in stark contrast to the life of a shipyard worker performing the duties enumerated in Section 2(3) of the LHWCA. Longshore workers, harbor workers, ship repairers, and other occupations enumerated in Section 2(3) of the LHWCA do not endure the rigors and travails of a seaman. Those workers live on land, are not assigned as part of the permanent company of a vessel, perform their work from a land-based shipyard at the direction of a land-based foreman, are not expected to serve on the vessel during long voyages, and do not answer to the master of a vessel. *See Lawson v. Maryland Casualty Co.*, 94 F.2d 193, 194 (5th Cir. 1938).

Factors Indicating Permanency

A number of factors may be relevant to the determination of whether an employee has a permanent

connection to a vessel in navigation. Relevant factors include, but are not limited to, those identified in *Lawson*: under whose authority the employee serves; whether the employee looks to the vessel for wages; whether the employee has a duty to protect the vessel in an emergency. *Maryland Casualty Co. v. Lawson*, 94 F.2d at 192.

While those factors are relevant, the Shipbuilders Council submits that no fact is more highly probative than the question of where the worker normally sleeps. A seaman who is part of a vessel's permanent company will normally sleep on the ship. Land-based maritime workers normally sleep at their permanent land-based homes, where they go when the working day is over. While this test may seem somewhat simplistic at first blush, the *amicus* suggests that it would lend substantial certainty and predictability to the determination of seaman status that the Ninth Circuit has rendered unpredictable. That test would be reinforced by examining whether the maritime worker was hired to work on a shipyard or to sail the seas. Applying a pragmatic analysis to the determination of whether an employee has a permanent connection to a vessel would also expedite the payment of LHWCA benefits to land-based maritime workers injured on the job.

IV

GIZONI DID NOT HAVE A SUFFICIENT CONNECTION TO A VESSEL IN NAVIGATION TO BE CONSIDERED A JONES ACT SEAMAN

Southwest Marine operates a shipbuilding and ship repair facility where, *inter alia*, it provides ship repair services to ocean-going vessels owned by the United

States government and commercial customers. The work performed by Southwest Marine is not atypical of ship repair work performed by other members of the Shipbuilders Council. Ships are sometimes drydocked and placed on huge supports to effect repairs. On other occasions, ships may remain afloat at the dock during repairs. Employees of the shipyard (including shipbuilders, ship repairers, ship-breakers, and other occupations enumerated in Section 2(3) of the LHWCA) perform repairs from various locations on board, underneath, or alongside the vessel. When in drydock or moored to a shipyard dock, a vessel itself becomes a work platform for the land-based maritime workers to perform maintenance and repairs to the vessel. Those workers do not become seaman simply because their job assignment calls for them to be working on board a vessel on a particular day.

Shipyards use a variety of structures as work platforms from which workers perform repairs. The floating platform on which Gizoni was injured was essentially an extension of the Southwest Marine drydock. It was moored to the drydock and to the stern of a U.S. Navy vessel in the yard for repair. Like driftwood, a floating work platform has no means of propulsion or guidance and would never be considered to be a vessel capable of independently traversing any body of water and arriving at a pre-determined port of destination. The reality of a shipyard is that a floating work platform is nothing more than a functional work device, just as scaffolding serves as a functional work platform for a land-based carpenter, painter, or mason.

Gizoni was a rigger working under the supervision of Southwest Marine's rigging superintendent. He

loaded equipment, materials, supplies, and vessel components onto and off of vessels repaired at the shipyard. He was never assigned to any vessel and performed work on vessels only in the course of his work for Southwest Marine.

Under those facts, which are undisputed, Gizoni is not a seaman. He has not alleged *any* employment-related connection to a vessel in navigation, much less the definite and permanent connection required by the lower courts. *See Wilander*, 111 S. Ct. at 817.[5] Even if the Court should adopt some lesser standard than the "definite and permanent connection" test proposed by the Shipbuilders Council, Gizoni fails because he was never assigned, even momentarily, to the crew of a ship and he never was engaged to "contribute to the function of [a] vessel or to the accomplishment of its mission." *Id.* at 817. He was a full-time employee of Southwest Marine assigned to repair ships docked or drydocked at his employer's shipyard.

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[5] The Shipbuilders Council rejects any contention that the floating platform on which Gizoni was working was his Jones Act "vessel." That platform is merely a work platform used to effect repairs on floating vessels at Southwest Marine's dock. It does not have any means of propulsion or steering, a raked bow, navigation lights, or crew facilities of any type. Lower courts have found similar floating platforms not to constitute vessels for purposes of the Jones Act. *Ellender v. Kiva Const. & Engineering, Inc.*, 909 F.2d 803, 806-08 (5th Cir. 1990); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292-94 (5th Cir. 1990); *Daniel v. Ergon, Inc.*, 892 F.2d 403, 407-08 (5th Cir. 1990). Nor was Gizoni permanently assigned to the platform. His injury occurred while he happened across the platform in the performance of his work for Southwest Marine.

V

SUMMARY JUDGMENT WAS APPROPRIATE ON GIZONI'S JONES ACT CLAIM

In a lawsuit under the Jones Act, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *McDermott International, Inc. v. Wilander*, 111 S. Ct. at 818. In the case before the Court, the facts reasonably support only the conclusion that Gizoni was a land-based maritime worker and not a seaman.

Seaman status under the Jones Act is a mixed question of law and fact. *Id.* The determination of the proper standard for seaman status is for the Court. *Id.* Once the Court defines the standard, the question on summary judgment becomes whether there is sufficient evidence on both sides of the issue that reasonable persons, applying the proper legal standard, could differ as to whether the employee in question satisfied that standard. If not, summary judgment is mandated.

This is not a case where Gizoni's duties were divided between service as a crewman on a vessel and service in a shipyard. Nor is this a case where there is a factual dispute over the duration of his assignment to a vessel or over the type of work he actually performed. The material facts are undisputed, and under those facts Gizoni cannot reasonably be classified as a seaman. The district court properly entered summary judgment for Southwest Marine.

VI

GIZONI SHOULD BE ESTOPPED FROM ARGUING HE IS A JONES ACT SEAMAN BECAUSE HE CLAIMED AND RECEIVED LHWCA BENEFITS

After his injury, Gizoni filed a formal claim for benefits under the LHWCA and received LHWCA benefits from Southwest Marine. He received $3,239.56 for medical expenses and $12,368.44 in disability benefits. As stated above, the Jones Act and the LHWCA are mutually exclusive remedies. *Wilander*, 111 S. Ct. at 817. A seaman may bring a negligence action against his shipowner employer, but may not recover LHWCA benefits. Conversely, a harbor worker or other land-based maritime employee covered by the LHWCA may receive LHWCA benefits but may not bring a negligence action against his employer.

Gizoni is attempting to take the best of both remedies. He succeeded in causing his employer to pay LHWCA benefits voluntarily on the basis that Gizoni was not a master or member of a crew of a vessel. He cannot now claim he was a member of a crew and thus ineligible for the LHWCA benefits he gladly accepted. The courts have fashioned the doctrine of equitable estoppel (sometimes called judicial estoppel) to prevent such abuses of the judicial system.

Equitable estoppel is a doctrine to be applied "to preclude a party from contradicting testimony or pleadings successfully maintained in a prior action." *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980). *See also* Wright, Miller & Cooper, Federal Practice and Procedure § 4477 (1981); 28 Am. Jur. 2d *Estoppel and Waiver* § 59. A party may invoke

the doctrine if it was an adverse party in the prior proceeding, it acted in reliance on the opponent's position in that proceeding, and it faces possible injury if the opponent is permitted to change that position in a later proceeding. *Konstantinidis v. Chen*, 626 F.2d at 937. Judicial estoppel involves the same principles but does not require privity of the parties, reliance, or injury. *Id.* The object of this doctrine is to prevent parties from taking advantage of the judicial system by changing their testimony or position from one proceeding to the next.

The doctrine of equitable estoppel has been applied to preclude parties from taking inconsistent positions in compensation/tort proceedings such as the case before the Court. *E.g., Roth v. McAllister Brothers, Inc.*, 316 F.2d 143, 145 (2d Cir. 1963) (employer that persuaded a state compensation board to dismiss proceedings on the ground that the claimant was a Jones Act seaman could not change its position as to the nature of the employment in a subsequent action under the Jones Act); *Littleton v. Mardigan*, 458 F.2d 251 (7th Cir. 1972) (plaintiff who recovered compensation benefits could not deny he was an employee in a subsequent action against a co-worker); *Smith v. Montgomery Ward & Co.*, 388 F.2d 291, 292 (6th Cir.), *cert. denied*, 393 U.S. 871 (1968) (claimant who asserted in compensation proceeding that his condition resulted from a work-related accident could not thereafter assert the injury occurred in an altercation with private investigators retained by his employer). *Contra Mike Hooks, Inc. v. Pena*, 313 F.2d 696 (5th Cir. 1963) (court held there was no privity between the parties in the two actions).

Gizoni asserted he was a land-based maritime worker entitled to compensation under the LHWCA. In reliance on that position, Southwest Marine paid Gizoni more than $15,000 in LHWCA benefits. Gizoni now argues that he was not a land-based worker (and thus not entitled to LHWCA benefits), but was instead a Jones Act seaman. The claim should be barred by the doctrine of equitable estoppel.

CONCLUSION

WHEREFORE, the Shipbuilders Council respectfully submits that the decision of the Ninth Circuit should be reversed and that the district court's order granting summary judgment for Southwest Marine should be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX A

The following are members of the Shipbuilders Council of America:

Regular Members

The American Ship Building Company, Tampa Shipyards, Inc.

Atlantic Marine, Inc.

Avondale Industries, Inc.

Bath Iron Works Corporation

Bender Shipbuilding & Repair Company, Inc.

Bethlehem Steel Corporation

Bollinger Machine Shop & Shipyard, Inc.

Edison Chouest Offshore, North American Shipbuilding, Inc.

General Dynamics Corporation

General Ship Corporation

Halter Marine, Inc.

Ingalls Shipbuilding, Inc.

Intermarine U.S.A.

The Jonathan Corporation

Marine Hydraulics International, Inc.

Marinette Marine Corporation

McDermott Corporation

Metro Machine Corporation

National Steel & Shipbuilding Company

Newport News Shipbuilding

Norfolk Shipbuilding & Drydock Corporation
Peterson Builders, Inc.
Robert E. Derecktor of Rhode Island, Inc.
Service Engineering Company
Southwest Marine, Inc.
Textron Marine Systems
Todd Shipyards Corporation

Allied Industry Members

ABB Combustion Engineering System
Bird-Johnson Company
Centrico, Inc.
Fairbanks Morse Engine Division
General Electric Company
Hopeman Brothers, Inc.
IMO Industries, Inc.
Jamestown Metal Marine Sales, Inc.
Jered Brown Brothers, Inc.
Lake Shore, Inc.
SPD Technologies
Sperry Marine, Inc.
Westinghouse Electric Corporation
York International Corporation

Affiliate Members

The Bingham Group
Colton & Company

PacOrd, Inc.
Peterson & Company
Poten & Partners, Inc.

Naval Architect Members

JJH Inc.
John J. McMullen Associates, Inc.
M. Rosenblatt & Son, Inc.

Association Members

New York and New Jersey Dry Dock Association
South Tidewater Association of Ship Repairers, Inc.

APPENDIX B

The following shipyards were used by the Bureau of Labor Statistics in 1980 to compute wage indices for shipyard workers. The shipyards that are highlighted closed in the year indicated.

The American Ship Building Company, Lorain, OH (1983)

Avondale Shipyards, Inc, New Orleans, LA

Bath Iron Works Corporation, Bath, ME

Bethlehem Steel Corporation, Beaumont, TX (1988)

Bethlehem Steel Corporation, San Francisco, CA (1981)

Bethlehem Steel Corporation, Sparrows Point, MD

Dravo Corporation, Neville Island, PA (1984)

FMC Corporation (Gunderson), Portland, OR (1986)

General Dynamics Corporation, Quincy, MA (1986)

General Dynamics Corporation, Electric Boat Division, Groton, CT

Levingston Shipbuilding Corporation, Orange, TX (1982)

Litton/Ingalls Shipbuilding, Inc., Pascagoula, MS

Lockheed Shipbuilding & Construction Co., Seattle, WA (1987)

Maryland Shipbuilding and Drydock Co., Baltimore, MD (1984)

National Steel & Shipbuilding Co., San Diego, CA

Newport News Shipbuilding, Newport News, VA

Todd Shipyards Corporation, San Pedro, CA (1989)

Todd Shipyards Corporation, Seattle, WA

Willamette Iron and Steel Corporation, Portland, OR (1981)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF REVERSAL

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INTEREST OF *AMICI CURIAE*

Global Marine, Inc., Halliburton Services, Ingram Industries, Inc., Quality Shipyards, Inc., Reading & Bates Corporation, Tidewater, Inc. and Zapata Gulf Marine Corporation each have employees engaged in maritime employment on the navigable waters of the United States and adjoining piers, docks, structures or other areas customarily used in loading, unloading, repairing, or building vessels. These employers also own and operate vessels and floatable structures or platforms engaged in operations on inland navigable waters of the United States and on the high seas.

They are defendants in frequent and extensive litigation involving the determination of status questions under both the Jones Act and the Longshore and Harbor Workers' Compensation Act. This litigation largely consists of multiple inconsistent claims for which these employers must procure two entirely different types of insurance coverage. For that reason, these employers wish for the Court to have their views and reasons for reversal of the ruling

below which conflicts with the expressed Congressional intent underlying the Longshore Act, and will only serve to further muddy the waters in seaman status cases.

If the decision below is permitted to stand, seaman status questions will henceforth be absolutely unpredictable and uniformly unresolvable at the trial court level. The number of fact-based seaman status appeals will multiply exponentially, requiring case by case appellate determination by an already overburdened court system.

The purpose of this brief is to persuade the Court to reverse the Ninth Circuit decision and to adopt a seaman status rule similar to that in Pizzitolo in order to establish uniformity of decisions consistent with express statutory provision and legislative intent.

All parties to this action have consented in writing to the submission of this brief.

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SUMMARY OF ARGUMENT

The decision of the Ninth Circuit in this case should be reversed because the opinion is contrary to the legislative development of the Longshore and Harbor Workers' Compensation Act[1] and the Jones Act[2] and directly contradicts United States Supreme Court precedents, including the recent unanimous decision in McDermott International, Inc. v. Wilander,[3] defining the term "seaman" and delineating the distinction between land-based maritime workers covered by the LHWCA and those relegated to Jones Act remedies. The decision below also conflicts with the body of jurisprudence denying seaman status, as a matter of law, to workers who have no permanent assignment to a vessel or fleet of vessels.[4]

1. 33 U.S.C. §§ 901-950 (1988), hereinafter "LHWCA" or "Longshore Act."
2. 46 U.S.C. § 688(a).
3. 111 S.Ct. 807 (1991), hereinafter "Wilander."
4. *See* Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977, 983 (5th Cir. 1987), cert. denied, 108 S.Ct. 1013 (1988), and its progeny, Williams v. Weber Management Services, Inc., 839 F.2d 1039 (5th Cir. 1987); Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991); and Bach v. Trident Steamship Co., Inc., 920 F.2d 322 (5th Cir. 1991).

This Court should adopt the rule enunciated in Pizzitolo v. Electro-Coal Transfer Corp.,[5] which is entirely consistent with this Court's unanimous decision in Wilander,[6] and restricts the definition of Jones Act seamen to "members of a crew of a vessel" in accordance with the expressed legislative intent of the LHWCA and the Jones Act. Such a seaman status rule, already developed and fine-tuned by the Fifth Circuit, eliminates confusion surrounding the status of harbor workers and furthers the purposes and intent underlying the LHWCA to confine Jones Act coverage to members of a crew of a vessel. Additionally, this status rule, when considered with the principles enunciated in Wilander, includes all employees permanently aboard a vessel and accounts for the technology of special purpose oil field vessels engaged in operations on navigable waters.

LHWCA coverage operates differently in the oil field and in the harbor. These distinct circumstances have confounded the formulation of a general seaman status test

5. 812 F.2d 977 at 983.
6. 111 S.Ct. 807 (1991).

which effectuates the Congressionally intended interaction among the Jones Act, the LHWCA and the Outer Continental Shelf Lands Act (OCSLA),[7] which applies the LHWCA to workers on fixed platforms or other structures on the outer Continental Shelf. Considering the legislative development of the Jones Act, the LHWCA and the OCSLA in context, the Pizzitolo/Wilander rule is a valid and reliable seaman status test which adheres to the statutory boundaries intended by Congress.

The principles enunciated by the Ninth Circuit in its decision below and in its earlier decision in Wenzel v. Seaward Marine Services, Inc.,[8] contravene the legislative history and development of the Jones Act and the LHWCA by including land-based maritime workers and harbor workers within the class of Jones Act seamen.

These maritime employers urge reversal of the Ninth Circuit and the adoption of a Pizzitolo status rule.

7. 43 U.S.C. § 1333(b).
8. 709 F.2d 1326 (9th Cir. 1983).

ARGUMENT

I. The Ninth Circuit Opinion Contradicts the Recent Unanimous Decision in *McDermott International, Inc. v. Wilander*.

The recent decision of this Court in Wilander[9] resolved the longstanding conflict between the Fifth Circuit,[10] on the

9. 111 S.Ct. 807 (1991).

10. The Fifth Circuit first synthesized its seaman status test in Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). Twenty-six years later, a divided Fifth Circuit sat *en banc* and reaffirmed its Robison test with some modifications in Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (*en banc*). The Fifth Circuit's Robison seaman status test states:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779.

one hand, and the Third[11] and Seventh[12] Circuits, on the other hand, with respect to the legal standard for determining Jones Act[13] seaman status. The Wilander decision expressly approved the second prong of the Fifth Circuit's seaman status test formulated in Offshore Company v. Robison,[14] which confers seaman status on all workers who are more or less permanently assigned to a vessel or who perform a substantial portion of their work aboard a vessel and whose duties contribute to the function or mission of the

11. The Third Circuit had followed the more traditional tripartite seaman status test originally enunciated by the First Circuit in Carumbo v. Cape Cod S.S. Co., 123 F.2d 991, 995 (1st Cir. 1941). That test requires "that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation." *Id.* at 995

12. The Seventh Circuit had formulated its seaman status test in Johnson v. John F. Beasley Construction Co., 742 F.2d 1054, 1061 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

13. The Jones Act, 46 U.S.C. § 688(a), in pertinent part provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . (1982)

14. 266 F.2d 769, 779 (5th Cir. 1959)

vessel.[15] In so doing, Wilander rejected the notion that a maritime worker must "aid in the navigation of the vessel" in order to attain Jones Act seaman status.

The Wilander decision rests on the developmental chronology of the Jones Act, passed in 1920, and the Longshore Act[16] as a compensation scheme for harbor workers passed in 1927, to eliminate Jones Act benefits to land-based maritime workers and harbor workers, and to substitute a compensation remedy for those workers.[17] In Wilander the court recalled the incorrect supposition made in Haverty[18] that Congress would not willingly "have allowed the protection to men engaged in the same maritime duties to vary with the accident of their being employed by a land-based stevedore rather than by the ship."[19] But as Wilander observed, "Congress would, and did [distinguish the

15. *Id.* at 779. *See supra*, note 10.
16. 33 U.S.C. §§ 901-950 (1988).
17. Messrs. Engerrand and Bale, Seaman Status Reconsidered, 24 S.Tex.. L.J. 431 (1983).
18. International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926).
19. *Id.* at 52. *See* Bull, Seaman Status Applied: A Practical Guide To Status Determination, 1 U.S.F. Maritime Law Journal, 43 (1989).

protection provided to maritime workers based upon whether the worker was employed by the ship or by a stevedore in the LHWCA]."[20]

Wilander establishes that the LHWCA and the Jones Act are mutually exclusive statutes.[21] In fact, the court there observed that:

> [I]t is odd but true that the key requirement for Jones Act coverage now appears in another statute [referring to "master or member of a crew of any vessel" in 33 U.S.C. 902(3)(G)].[22]

Consequently, under the principles enunciated in Wilander, no land-based workers are "seamen."[23] Wilander also makes clear that "with the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen."[24]

20. Wilander, 111 S.Ct. at 813.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

Wilander sets out an important guideline for determining the proper legal standard for seaman status under the Jones Act -- whether the maritime worker is land-based or sea-based. This pivotal factor of whether the worker is land-based or sea-based is derived from an analysis of the history of the statutory interplay between the Jones Act and the LHWCA which delineated Jones Act seaman status.[25] To rule that a land-based ship repairman may be a Jones Act seaman is in direct conflict with the principles established in Wilander.

The Wilander decision is rooted in the historical development of the law of seamen, especially in the context of

25. The LHWCA covers maritime workers, and at § 902(3), defines maritime "employee" as

> When used in this chapter --
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --
>
> * * *
>
> (G) a master or member of a crew of any vessel.

the longstanding competing forces between the congressional enactments of the Jones Act and the LHWCA and the court decisions interpreting those acts. The legislative history of the enactment and subsequent amendments to the LHWCA and the Jones Act span most of this century. When considering the issues of this statutory interface, as was done in Wilander, the court should effectuate the express language of the coverage provisions of the LHWCA within the context of its entire legislative history.

II. The Ninth Circuit Decision Conflicts with Most Harbor-Based Jones Act/LHWCA Decisions.

The Ninth Circuit decision should be reversed as contrary to authoritative maritime jurisprudence. Not only does the appellate opinion below contradict the recent decision in Wilander,[26] but both the result and the analysis employed by the Ninth Circuit also conflict with the great weight of jurisprudence denying seaman status to land-based

26. 111 S.Ct. 807 (1991).

employees, harbor workers and ship repairmen,[27] and restricting Jones Act coverage to members of the crew of a vessel who have more or less permanent attachment to that

27. For example, Sharp v. Wausau Insurance Companies, 917 F.2d 885 (5th Cir. 1990) (welder/piledriver who lived ashore engaged in rebuilding a train bridge over Lake Pontchartrain); Williams v. Weber Management Services, Inc., 839 F.2d 1039 (5th Cir. 1987) (repairman, hired from a pool of temporary workers, to repair the drum and brake assembly of a crane on a moored barge and to hose off its deck); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988) (electrician employed by operator of a coal terminal and dock on the Mississippi River who lived on shore and worked out of a shore-based electrical shop maintaining and repairing both shore-based machinery and electrical equipment on vessels owned by his employer); *see also*, Balfer v. Mayronne Mud & Chemical Company, 762 F.2d 432, 434 (5th Cir. 1985); Buras v. Commercial Testing & Eng'g Co., 736 F.2d 307 (5th Cir. 1984; White v. Valley Line Co., 736 F.2d 304 (5th Cir. 1984); Jones v. Mississippi River Grain Elevator Co., 703 F.2d 108 (5th Cir.), *cert. denied*, 464 U.S. 856, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983); Bouvier v. Krenz, 702 F.2d 89, 90 (5th Cir. 1983); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349 (5th Cir. 1983); Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir.), *cert. denied*, 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87 (1981); Cox v. Otis Engineering Corp., 474 F.2d 613 (5th Cir. 1973); Thomas v. Peterson Marine Serv., 411 F.2d 592 (5th Cir. 1969), *cert. denied*, 396 U.S. 1006, 90 S.Ct. 562, 24 L.Ed.2d 499 (1970); Rotolo v. Halliburton Co., 317 F.2d 9 (5th Cir.), *cert. denied*, 375 U.S. 852, 84 S.Ct. 111; 11 L.Ed.2d 79 (1963).

vessel or a fleet of vessels.[28] The Ninth Circuit opinion also ignores the principles that Jones Act status be determined in the context of the worker's entire employment with his current employer or in view of the nature and location of his work as a whole.[29]

28. Many maritime employees with undisputed maritime duties or navigational functions are not Jones Act seamen because they are not members of the crew of a vessel and they have no permanent attachment to a vessel or identifiable fleet of vessels. Bach v. Trident Steamship Co., Inc., 920 F.2d 322, 324-26 (5th Cir. 1991) (compulsory river pilot who was engaged to pilot an oceangoing vessel through a section of the Mississippi River between New Orleans and Pilottown); Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991) (a wireline operator employed by an oilfield service company who performed wireline services for operators of various oil production facilities both onshore and in state and federal waters); Ketnor v. Automatic Power, Inc., 850 F.2d 236, 237-38 (5th Cir. 1988) (a service technician employed to check and repair lights and horns on oil and gas wells in state territorial waters and in the Gulf of Mexico); Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1068-1069 (5th Cir. 1986) (*en banc*) (welder's helper engaged in maintenance and repair work to offshore platforms and fixed structures in the Gulf of Mexico who was quartered on a fixed platform called "Mike's Structure").

29. *See also* Prinzi v. Keydril Co., 738 F.2d 707, 711 (5th Cir. 1984); White v. Valley Line Co., 736 F.2d 304, 306 (5th Cir. 1984); Wallace v. Oceaneering International, 727 F.2d 427, 432 (5th Cir. 1984); Buras v. Commercial Testing & Engineering Co., 736 F.2d 307, 311 (5th Cir. 1984; Bouvier v. Krenz, 702 F.2d 89, 90 (5th Cir. 1983); Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1347 (5th Cir. 1980); Brown v. ITT Rayonier, Inc., 497 F.2d 234 (5th Cir. 1974).

III. The Ninth Circuit Decision Conflicts with the Statutory Language and the Legislative Development of the Jones Act and the LHWCA.

The decision of the Ninth Circuit should be reversed as contradictory to the statutory interface between the LHWCA and the Jones Act. The finding by the Ninth Circuit that Gizoni may be a Jones Act seaman contradicts the express language of the LHWCA coverage definition which includes "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ."[30]

Both the result and the analysis followed by the Ninth Circuit opinion contravene the legislative development of the Jones Act, and the LHWCA. An authoritative study of the legislative and jurisprudential development of the Jones Act and the LHWCA is set out by Messrs. Engerrand and Bale, Seaman Status Reconsidered, 24 S.Tex. L.J. 431 (1983). *See also,* Seaman Status Reconstructed, 32 S.Tex.L.R. ___ (1991).

30. 33 U.S.C. § 902(3)(G).

While Congress was developing the LHWCA in 1926, the Supreme Court held that the term "seaman" as used in the Jones Act included a longshoreman employed on navigable waters who sued his stevedore employer for the negligence of a co-employee.[31] Determined to grant land-based maritime workers similar remedies as other land-based workers, Congress passed the LHWCA within six months of the Haverty decision, which also excluded land-based workers from Jones Act coverage.

The LHWCA provided a compensation remedy for all maritime workers injured on navigable waters, but expressly excluded "a master or member of a crew of any vessel."[32] Thus, passage of the LHWCA in 1927 legislatively amended

31. Haverty, 272 U.S. 50, 52 (1926).
32. 33 U.S.C. § 902(3)(G) and § 903(a).

the Jones Act and restricted the class of Jones Act seamen to "masters or members of a crew of a vessel."[33]

Despite this legislative removal of land-based harbor workers and longshoremen from the Jones Act, the courts continued to expansively define the term "seaman." Again, in Seas Shipping Co. v. Sieracki,[34] this Court held that a longshoreman was a "seaman" and as such entitled to the warranty of seaworthiness. Still determined to treat harbor workers the same as other land-based workers, the next LHWCA amendment in 1972 expressly eliminated this

33. Wilander, 111 S.Ct. at 813. This result had been declared previously by the Supreme Court in three earlier decisions, South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940); Swanson v. Marra Bros., 328 U.S. 1, 5 (1946); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957), and has been reiterated in a string of Fifth Circuit decisions, Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977, 981 (5th Cir. 1988), *cert. denied*, 108 S.Ct. 1013 (1988); Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1070 (5th Cir. 1986) (*en banc*); Munguia v. Chevron Company, U.S.A., 768 F.2d 649, 654 (5th Cir. 1985); Bouvier v. Krenz, 702 F.2d 89, 91 (5th Cir. 1983); Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452, n.2 (5th Cir. 1980); Brown v. ITT Rayonier, Inc., 497 F.2d 234, 236 (5th Cir. 1974); Burns v. Anchor-Wate Co., 469 F.2d 730, 732 (5th Cir. 1972); Barrios v. Louisiana Constr. Materials Co., 465 F.2d 1157, 1161 n. 3 (5th Cir. 1972); McKie v. Diamond Marine Co., 204 F.2d 132, 135-36 (5th Cir. 1953).

34. 328 U.S. 85, 99 (1946)

unseaworthiness action for longshoremen and substituted a negligence action similar to that available to other land-based workers.

The Ninth Circuit decision flies in the face of this repeatedly expressed Congressional determination to treat ship repairmen similarly to other land-based workers.

IV. The Pizzitolo Rule Eliminates Much of the Confusion Created by the Application of Seaman Status Tests in the Harbor and Accurately Delineates the Statutory Interface Between the Jones Act and the LHWCA.

In 1987, the confusion generated by applying seaman status tests to longshoremen and harbor workers was substantially eliminated by the Fifth Circuit in Pizzitolo v. Electro-Coal Transfer Corp.[35]

The area of land-based maritime workers in and around the harbor and in the shipyard, which is the battleground in both Pizzitolo and Gizoni, has generated the most confusion in Jones Act seaman status decisions. Under the Fifth Circuit test, confusion resulted because the first two

35. 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988) [hereinafter "Pizzitolo"].

prongs of the Robison seaman status test: "permanent assignment" and "substantial work on board a vessel" are alternative; and hence, ostensibly, all longshoremen and harbor workers satisfy the Robison seaman status test, because they perform:

> A substantial portion of their work on a vessel;
>
> and,
>
> Their duties contribute to the function or mission of the vessel or its operation and welfare in maintenance during movement or anchorage for future trips.

The application of the Robison seaman status test to a land-based harbor worker confers seaman status on every longshoreman who performs substantial work on vessels. The confusion generated by this over-expansive definition applied by jurors not versed in the distinction between longshoremen and seamen, further expanded seaman status to cover just about any worker injured on a vessel (or floating structure) and encouraged appellate resolution of every seaman status determination.

In order to include all members of the crew of the vessel, the courts had gradually expanded the traditional navigational-function test in its application. In the Fifth Circuit, Judge Wisdom crafted the Robison test for Jones Act seaman status in Offshore Co. v. Robison,[36] under which Jones Act seaman status was no longer limited to members of the crew of the vessel or the "ship's company," because a more or less permanent assignment was no longer required for crew member status. A worker now satisfied the vessel-attachment requirement by simply performing "a substantial part of his work on the vessel." *Id.* at 779.

In 1986, some uncertainties were reduced in Barrett v. Chevron U.S.A.,[37] when the seaman status test for amphibious oil field workers who claim their seaman status under the "substantial work" prong of the Robison test was required to be "in the context of his entire employment with his current employer." Additionally, those workers who did not perform "traditional seaman's duties" must have

36. 266 F.2d 769, 779 (5th Cir. 1959).
37. 781 F.2d 1067 (5th Cir. 1986) (*en banc*).

performed their duties on a "fleet of vessels."[38] Even with this restriction on the Robison test, traditional longshoremen and land-based ship repairmen and harbor workers such as Gizoni, Wenzel, Simko, Johnson and Pizzitolo satisfied the Robison/Barrett test wherever they worked on an identifiable group of vessels.

Barrett did not solve the confusion surrounding workers, land-based workers or harbor workers, who performed their duties on and about vessels which form a fleet. However, Pizzitolo has since solved that problem within the Fifth Circuit.

Pizzitolo

In 1987, Judge Davis (who authored the majority opinion in Barrett), substantially eliminated the confusion generated by application of the Robison seaman status test to longshoremen and harbor workers in Pizzitolo.[39]

38. 781 F.2d at 1074.

39. 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988).

Pizzitolo was employed as an electrician by Electro-Coal, the owner and operator of a coal terminal and dock on the Mississippi River. Electro-Coal routinely transfers coal from vessel to vessel and vessel to shoreside storage areas. Pizzitolo worked a standard forty-hour work week and arrived for work each morning at the shore-based electrical shop where he received assignments from a foreman. Although 75% of his work time was spent maintaining and repairing shore-based machinery and 25% was spent repairing electrical equipment on the vessels owned by Electro-Coal, when injured, he was repairing one of the conveyors used to load and unload the vessel when he fell into the river.

Pizzitolo filed suit against his employer under the Jones Act and General Maritime Law, and the issue of Jones Act seaman status was submitted to the jury which found seaman status. The district judge disagreed with the jury's finding that Pizzitolo was a seaman and granted a judgment notwithstanding the verdict on the issue of seaman status.

The Fifth Circuit Pizzitolo opinion, like this Court's decision in Wilander, rests on the chronology of statutory development under the Jones Act passed in 1920 and the LHWCA, passed in 1927, to eliminate Jones Act benefits to land-based maritime workers and harbor workers, and to substitute a compensation scheme for those workers. The Pizzitolo decision rests upon the Congressional intent in passing the LHWCA in 1927, following the passage of the Jones Act in 1920, and reiterates that:

> The 1927 LHWCA, in effect, amended the Jones Act to make Jones Act benefits available only to maritime workers not covered by the LHWCA. Harbor workers engaged in occupations such as longshoring, shipbuilding and ship repairing, who were injured on navigable water, were the intended beneficiaries of the 1927 Act. The LHWCA as amended in 1972 expressly covered workmen engaged in these occupations. In 1972, coverage of these workmen's activities was extended beyond navigable water to cover their injuries on adjacent landbased work locations. Given the explicit coverage of workmen engaged in the enumerated occupations, we reject the notion that Congress could have intended to exclude them from the benefits of the LHWCA as members of the crew of a vessel. In sum, we hold that because longshoremen, shipbuilders and ship repairers are engaged in occupations enumerated in the LHWCA, they are unqualifiedly covered by that Act if they

> meet the Act's situs requirements; coverage of these workmen by the LHWCA renders them ineligible for consideration as seamen or members of the crew of a vessel entitled to claim the benefits of the Jones Act.
>
> The only work Pizzitolo performed aboard vessels was electrical repair work. Even if he spent a substantial portion of his work time aboard a recognized fleet of vessels performing electrical repairs, for reasons stated above he is covered by the LHWCA and cannot qualify as a seaman within the meaning of the Jones Act.[40]

Thus, wherever the worker is within an occupation category expressly enumerated in § 902(3) of the LHWCA, he is unqualifiedly covered by the LHWCA if he meets the LHWCA situs requirement [that is, if he was injured on navigable waters or an adjoining area under § 903(a)], and summary judgment dismissing a claim for Jones Act seaman status is appropriate. Where the worker is in an occupation specifically enumerated in the LHWCA, the Robison seaman status test is legally irrelevant.

That is, if the plaintiff in a Jones Act suit is a harbor worker, longshore worker, shipbuilder or ship repairer, Pizzitolo declares that he is no longer entitled to have his

40 Pizzitolo, 812 F.2d at 983.

Jones Act claim considered under the Robison seaman status test of "substantial portion of work aboard a fleet of vessels" and "duties contribute to the function or mission of vessels." Under Pizzitolo, the question of status is analyzed by first determining whether the worker is in one of the statutorily enumerated occupations, and then whether he meets the situs requirement under 33 U.S.C. § 903(a). If both are present, the Jones Act claim will be dismissed as a matter of law without ever reaching the Robison seaman status test.

In the Circuits which had followed the now defunct navigational-function test, confusion still reigned in seaman status cases involving land-based or harbor-based maritime workers because those workers frequently performed some maneuvering functions in connection with vessels or floating structures.[41]

41. *See, e.g.*, Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326, 1327 (9th Cir. 1983) (Diver/tender engaged in underwater ship repairs may have operated a SCAMP, a submerged cleaning and maintenance platform); Searcy v. E.T. Slider, Inc., 679 F.2d 614, 616 (6th Cir. 1982) (Nightwatchman at sand and gravel business on the bank of the Ohio River filled gas pumps and placed lanterns on moored barges).

For example, Gizoni and Wenzel were both ship repairmen, an occupation enumerated in the LHWCA, and were both injured on navigable water. In the Circuits which followed the navigational function test, both Gizoni and Wenzel may have been found to be seamen. However, under Pizzitolo, both Wenzel and Gizoni meet the LHWCA situs requirement, are covered by the LHWCA, and are ineligible for consideration of seaman status under the Jones Act.[42] In other words, before the Ninth Circuit decision in this case, the Fifth Circuit's Pizzitolo rule had resolved the confusion which had provoked these concerns created by applying seaman status tests to workers like Wenzel and Gizoni. As of 1987, the employee and work situation presented in this case no longer created a problem within the Fifth Circuit, and summary judgment denial of Jones Act status was proper.

V. Seaman Status Should Often be Determined by Summary Judgment and by Directed Verdict.

The indiscriminate application of seaman status tests by jurors to workers who are engaged in those specific

42. Pizzitolo, 812 F.2d at 984.

occupations enumerated in § 902(3) of the LHWCA generates an over-expansive class of Jones Act seamen which includes many land-based ship repairmen, traditional longshoremen, and harbor workers whose only work on vessels is in port. Within the Fifth Circuit, the consistent practice prior to Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980), of submitting every marginal status issue to the jury panel, served to increase confusion in the Jones Act arena, until its zenith when two Jones Act cases decided on substantially identical facts yielded contradictory panel results on seaman status. *See* Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 282 (5th Cir. 1981).

In Wilander, this Court characterized the question of seaman status as a mixed question of law and fact.[43] Wilander declared that "[i]t is for the court to define the statutory standard. 'Member of a crew' and 'seaman' are statutory terms; their interpretation is a question of law."[44] In cases where the underlying facts are established, and the

43. Wilander, at 818. *See* Holland v. Allied Structural Steel Corp., 539 F.2d 476 (5th Cir. 1976); Keener v. Transworld Drilling Co., 468 F.2d 729 (5th Cir. 1972).

44. Wilander, at 818.

rule of law is undisputed, the only issue is whether the facts meet the statutory standard. The Pizzitolo rule as a threshold status issue, can provide an appropriate statutory standard sufficient to support dismissal on summary judgment under Federal Rule of Civil Procedure 56 or its state counterpoint in cases involving workers engaged in the occupations enumerated in the Longshore Act, 33 U.S.C. § 902(3).

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Substantive law identifies which facts are material to the determinative law for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted. Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Furthermore, Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the Rule prior to trial, that the claims and defenses have no factual basis. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Given the established legal framework surrounding Jones Act seaman status enunciated in Wilander and Pizzitolo, the factual disputes which are material to the seaman status issue have been significantly reduced, and in many cases, such as this one, the factual disputes are not material to the determining legal issues and seaman status can often be decided as a matter of law either on summary judgment or directed verdict.[45]

45. *See* Tullos v. Resource Drilling, Inc., 750 F.2d 380 (5th Cir. 1985); Bernard v. Binnings Construction Co., Inc., 741 F.2d (5th Cir. 1984).

Proposed Seaman Status Test

In order to assist the trial court in determining whether or not such claimants are entitled to a jury trial on their alleged Jones Act claims, in answering the question accepted for review in this case, this Court should clearly enunciate a seaman status test. When the Court formulates such a status test, the focus should remain on the language and intent underlying the LHWCA, as in Wilander, and should encompass the entire crew of a vessel but exclude workers who are not part of that ship's regular company.

The simplest and most reliable seaman status test is to require that the worker be more or less permanently assigned to a vessel or a fleet of vessels in navigation and perform the work of such vessel or vessels.[46] Such a seaman status test, after an initial threshold application of the Pizzitolo rule, to eliminate land-based maritime workers and harbor workers, would create an appropriate class of Jones Act seamen consistent with the statutory interface between the Jones Act

46. *See* Wilander, 111 S.Ct. at 817. Such a seaman status formulation was denominated as the "real test" by Judge Skelly Wright in Perez v. Marine Transport Lines, 160 F.Supp. 853 (E.D.La. 1958).

and the LHWCA. This test would eliminate the confusion surrounding land-based workers and would comply with Congressional intent to restrict Jones Act coverage to masters and members of the crew of a vessel.[47]

47. LHWCA, 33 U.S.C. at § 902(3)(G) (1988).

CONCLUSION

The decision of the Ninth Circuit should be reversed and this Court should adopt the Pizzitolo rule as a threshold seaman status test to eliminate land-based maritime workers and harbor workers. Such a rule best conforms to the express statutory language and the Congressional intent underlying the Jones Act and the LHWCA.

Respectfully submitted,

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